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Recent Developments in Aviation Law

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RECENT DEVELOPMENTS IN AVIATION LAW

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‡ This Article is dedicated to the memory of John J. Tigert, IV. John was a stalwart leader of the SMU Air Law Symposium for many years. We profited from his work. We grew because of his influence. We are saddened by his passing.

I. EMPLOYMENT LAW

A. RAILWAY LABOR ACT

THE CASE OF *Independent Federation of Flight Attendants v. Trans World Airlines*[1] revolved around the question of whether a labor dispute between the two parties should enter arbitration. For many years, the parties had carried on their relationship based on a collective bargaining agreement that fixed the rate of pay and working conditions of flight attendants at Trans World Airlines (TWA). In 1989, however, a dispute arose regarding the firing of a flight attendant by TWA. A settlement of the grievance filed by the flight attendant was arranged between the plaintiff and the defendant. However, the flight attendant refused to go through with the settlement and instituted her own cause of action against TWA. Subsequently, TWA withdrew its offer of settlement of the agreement.

The union then filed a declaratory judgment action seeking to force the defendant to arbitrate the grievance, arguing that the grievance remained unresolved. The defendant argued that the grievance was settled and, thus, there was no grievance to arbitrate. The court stated, "[t]he parties' dispute is whether the grievance was settled or not. The issue for this [c]ourt to decide is whether this [c]ourt has jurisdiction to resolve the dispute or whether the System Board of Adjustment has exclusive jurisdiction to resolve the dispute (via arbitration)."[2]

In resolving the dispute, the court looked to the Railway Labor Act (RLA), which was created to "promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes."[3] The RLA classified disputes as either major or minor. Major disputes related to the creation or modification of collective bargaining agreements, while minor disputes sought to enforce the rights already present in collective bargaining agreements. Section 184 of the RLA provides that minor disputes are subject to compulsory and binding arbitration before the System Board of Adjustment.[4] The court found that the parties were disputing whether the flight attendant's agreement was settled in accordance with the collective

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[1] 918 F. Supp. 293 (E.D. Mo. 1996).

[2] *Id.* at 295.

[3] Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994).

[4] *See* 45 U.S.C. § 84 (1995).

bargaining agreement. Thus, the court found the dispute to be a minor one and ordered the matter to proceed to arbitration.[5]

In *Shafii v. British Airways, PLC*,[6] a reservation sales agent with British Airways in New York brought a criminal harassment claim against his supervisor. The parties reached an agreement through mediation. However, the airline transferred him to a new work area, later suspended him, and ultimately fired him. As he was required to do by collective bargaining agreement, the plaintiff filed a grievance challenging his termination. Plaintiff then filed a complaint against British Airways in the New York State Supreme Court, Queens County, in which he claimed that he was transferred and ultimately fired in retaliation for his filing the criminal harassment charge. He also claimed that the airline's decision to fire him was in violation of the mediation agreement in which the airline had agreed "not to pursue any claims" related to the harassment charge.[7] Lastly, he claimed he had been slandered and defamed.

The lower court found that this action was preempted by the RLA. The Second Circuit Court of Appeals disagreed stating, "[t]he standard for determining when a state claim is preempted by the RLA is simply and clearly stated: '[W]here the resolution of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is preempted.'"[8] The court concluded that none of the claims required an interpretation of the collective bargaining agreement, and furthermore, none of the claims were grounded on rights and obligations that existed independently of the collective bargaining agreement.[9] Thus, the court ruled that the plaintiff's claims existed independently of the collective bargaining agreement and remanded the entire action to the state courts.[10]

In *Burgos v. Executive Air, Inc.*,[11] the issue was whether the plaintiff's state law claims were preempted by the RLA. The plaintiff, a former airline flight attendant, brought suit under Puerto Rico's labor laws, alleging that her former employer, Executive Air, failed to compensate her for overtime. The defendant maintained that the RLA preempted a plaintiff's state action

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[5] *See Independent Fed'n*, 918 F. Supp. at 296.
[6] 83 F.3d 566 (2d Cir. 1996).
[7] *See id.* at 568.
[8] *Id.* at 569-70 (quoting *Hawaiian Airlines*, 512 U.S. at 261).
[9] *See id.* at 570.
[10] *See id.*
[11] 914 F. Supp. 792 (D.P.R. 1996).

because the conflict was a so-called "minor dispute" for which the federal arbitration process was the exclusive recourse, preempting state law actions. However, the plaintiff maintained that the RLA should not preempt her challenge because the state law claim she asserted did not directly involve the terms of a collective bargaining agreement.

In resolving this issue, the court stated, "plaintiff's status under Puerto Rico law depends upon the interaction of three separate articles of the CBA [(collective bargaining agreement)]."[12] Because the dispute concerned the interpretation of a collective bargaining agreement, and as such was a minor dispute, the court found that the state law causes of action were preempted.[13]

The litigation in *Pyles v. United Airlines, Inc.*[14] evolved out of the sale of Boeing 747 aircraft and European routes from Pan Am to United Airlines in 1990. Agreements were made between the two companies to transfer Pan Am flight crews to United Airlines in order to minimize the potential job losses that the agreement would cause. United made two separate agreements, one with Pan Am as part of the sale, and one with the Airline Pilots Association (ALPA) regarding the standards and conditions of the transfer of the flight crews. The plaintiff in this case was a pilot with Pan Am who was to be part of a crew transfer from Pan Am to United. However, one of the conditions that United made with Pan Am and ALPA was that United would be able to use its normal hiring procedures and standards and that any applicants would have to pass United's flight medical examination. The plaintiff underwent a physical examination and failed because he had radial keratotomy surgery on his eyes four years earlier.

Plaintiff brought three state law claims. The first was a breach of the route purchase agreements between Pan Am and United. The second was a breach of the letter of agreement between United and ALPA, and the third was a claim that United had tortiously interfered with the business relationship between the plaintiff and Pan Am.

The court dismissed plaintiff's first claim because Pan Am and United had expressly set out that there would be no third-party beneficiaries to their agreements. The court found that for the

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[12] *Id.* at 796.

[13] *See id.* at 797.

[14] 79 F.3d 1046 (11th Cir. 1996).

plaintiff to prevail on his tortious interference allegation, he must establish the following: (1) the existence of a business relationship under which he had legal rights; (2) knowledge by United of such a relationship; (3) an intentional and unjustified interference with his relationship by United; and (4) damage to the plaintiff.[15] The court found no factual basis for sustaining the third or fourth elements and dismissed plaintiff's third claim.[16]

The court dismissed the plaintiff's second claim because it was preempted by the RLA. The court stated, "it has long been the rule that when the resolution of a state-law claim, such as the breach of contract claim here, requires an interpretation of the CBA [(collective bargaining agreement)], the claim is preempted and must be submitted to arbitration before a system board of adjustment."[17]

The case of *Association of Flight Attendants v. United Airlines, Inc.*[18] involved a court's jurisdiction to hear a collective bargaining dispute. When United Airlines acquired Air Wisconsin, the Association of Flight Attendants (AFA) demanded that the Air Wisconsin flights be staffed only by flight attendants on United Airlines system's seniority list under the terms and conditions of the AFA-United's collective bargaining agreement, notwithstanding the AFA-Air Wisconsin collective bargaining agreement. When United refused, the AFA filed a grievance.

The AFA pointed to a side letter agreement drafted in 1986 for the source of United's contractual obligation. The agreement provided, in part, that neither United Airlines nor any successor, assign, or subsidiary would conduct any commercial flight operations of the type historically performed by United Airlines flight attendants unless it performed such work with flight attendants on the United Airlines system's seniority list. In response, United asserted that the AFA's claim fell within the National Mediation Board's exclusive jurisdiction. The AFA sought an order in the district court to compel United to arbitrate a scope clause claim before a System Board of Adjustment.

The key to this dispute was the court's characterization of it under the RLA. The AFA claimed that it was a "minor" dispute, while United claimed that it was a "representation dispute." A

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[15] *See id.* at 1049.

[16] *See id.*

[17] *Id.* at 1050.

[18] 71 F.3d 915 (D.C. Cir. 1995).

minor dispute would be submitted to arbitration. The representation issue, on the other hand, was within the exclusive jurisdiction of the National Mediation Board (NMB). United claimed the issue was a representation matter because, "the 'NMB must first resolve the question of whether previously separate carriers have in fact combined to form a single carrier and whether the employee groups at each carrier should therefore be combined.'"[19]

The court distinguished the cases United cited and the circumstances of the case at issue. United relied on cases in which two airlines merged, and their employees were represented by different unions. The court found that in the current case, the two groups of employees were represented by the same union, "so there [was] no question as to the identity of the exclusive representative."[20] The remaining question was whether the district court's order interfered legally or practically with the NMB's capacity to determine whether the flight attendants of both airlines constituted one or separate classes of employee groups. The court of appeals decided that the order of the district court did not interfere with the board's function because the board was free to make its own determination as to the status of the particular employee groups or classes.[21] The court thus held that the matter should proceed to arbitration.

The plaintiffs in *Pilkington v. United Airlines, Inc.*[22] were replacement pilots hired by United during a strike against it in 1985. The employment agreement made between United and the replacement pilots provided that United would support the replacement pilots in the event of any difficulties with the returning pilots after the strike.

When the plaintiffs encountered harassment after the strike and received no help from United's management in stopping the harassment, they filed a complaint asserting five causes of action: (1) a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO); (2) tortious interference with the contract claim against the Airline Pilots Association (ALPA); (3) tortious interference with the business relationships claim against the ALPA; (4) a breach of contract claim against United; and (5) a fraudulent misrepresentation claim against United.

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[19] *Id.* at 918 (citation omitted).

[20] *Id.* at 919.

[21] *See id.* at 919.

[22] 921 F. Supp. 740 (M.D. Fla. 1996).

The court dismissed the RICO count because it was time barred. A civil RICO claim must be brought within four years of the time that the cause of action accrues.[23] The court found that the plaintiffs knew and were clearly aware of the harassment more than four years before filing their lawsuit.[24]

In addressing the state law claims against United and the ALPA, the court looked to the RLA preemption standard. The court stated, "where interpretation of the collective bargaining agreement is required to adequately address and resolve a dispute, federal law must pre-empt state law."[25] The court found that the RLA preempted all four of the plaintiffs' state law claims because they all required an interpretation of the collective bargaining agreement between the plaintiffs and United.[26]

In *Goulart v. United Airlines, Inc.*,[27] the plaintiffs were seventy-one employees or former employees of United Airlines. They claimed that United and the International Association of Machinists and Aerospace Workers violated RICO by misrepresenting the seniority consequences of accepting promotions that occurred from a growth in United's business in the mid-80s. United allegedly informed them that company seniority, not classification seniority, would determine their status in the event of layoffs or recalls. However, when a downturn in United's business occurred, the classification system was used.

Defendant filed for summary judgment on the basis that the plaintiffs' claims only stated a minor dispute which the RLA preempted. The court determined that the RLA governed relations between air carriers and their union employees by establishing a mechanism for the settlement of two classes of disputes, major disputes and minor disputes.[28] The latter "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."[29] Such disputes "must be resolved only through the RLA mechanisms."[30] Thus, the RLA preempted all of these types of claims. An exception existed, however, for causes of actions independent of the collective bargaining agreement.

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[23] *See id.* at 746.
[24] *See id.* at 746-47.
[25] *Id.* at 748.
[26] *See id.* at 749.
[27] No. 94-C-6237, 1996 WL 111895, at *1 (N.D. Ill. Mar. 12, 1996).
[28] *See id.* at *1.
[29] *Id.* at *1-2 (quoting *Hawaiian Airlines*, 512 U.S. at 252-53).
[30] *Id.* at *2 (quoting *Hawaiian Airlines*, 512 U.S. at 253).

The defendants claimed that the RICO claim was preempted by the RLA because the seniority rights that the plaintiffs sought to vindicate through their RICO claim were based on an existing collective bargaining agreement. The court decided that because "the plaintiffs had no substantive right to seniority benefits independent of the collective bargaining agreement[,]" their RICO claim was preempted.[31] The court concluded, "[t]he ultimate relief sought by the plaintiffs, the restoration of their seniority benefits, does not exist independent of the collective bargaining agreement. . . . In order to vindicate these rights, the plaintiffs must rely on the mechanisms established by the Railway Labor Act."[32]

The plaintiffs in *Fry v. Airline Pilots Ass'n International*[33] were pilots who crossed a picket line during a 1985 United strike. When the strike was over, the strike breakers encountered harassment from the returning striking workers. Plaintiffs filed suit against United Airlines and the Airline Pilots Association International (APAI) on eleven claims arising out of that harassment. The district court adopted a magistrate judge's recommendation that the claims were preempted by the RLA because the claims required interpretation of collective bargaining agreements.

The Tenth Circuit first looked at the plaintiffs' claims against United. The court determined that the emotional distress claims brought by the plaintiffs were preempted by the RLA because an interpretation of the collective bargaining agreement between the airline and the union was necessary to resolve the claim.[34] Because such interpretation of collective bargaining agreements was considered a "minor dispute" under the RLA, the court stated that the sole remedy for such a dispute is arbitration.[35] The court then turned to the plaintiffs' federal conspiracy RICO and state corrupt organization claims. Again, the court found that the RLA preempted these claims because they were classified as "minor disputes" with the remedy for such claims being arbitration.[36]

The court then turned to the plaintiffs' claims against the APAI. The court found that the RLA did not preempt emo-

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[31] *Id.* at *4.
[32] *Id.*
[33] 88 F.3d 831 (10th Cir. 1996).
[34] *See id.* at 840.
[35] *See id.* at 837.
[36] *See id.*

tional distress claims brought by the plaintiffs against the union because an interpretation of the collective bargaining agreement was unnecessary for resolution of the claim.[37] The court stated, "the alleged conduct here does not need to be explained in terms of the contract. Obviously, outrageous conduct is 'not even arguably sanctioned by the labor contract.'"[38]

The plaintiff in *Kozy v. Wings West Airlines, Inc.*[39] was a pilot fired by Wings West for sexual harassment. Pursuant to a collective bargaining agreement between the airline and his union, plaintiff filed a grievance protesting his dismissal to the System Board of Adjustment. The Board dismissed his grievance after which he filed suit against both the airline and his union. Plaintiff's action against Wings West was for breach of the collective bargaining agreement, and the action against the union was for breach of the duty of fair representation.

Central to the plaintiff's complaint was that after his grievance hearing, the Board failed to send him a written decision detailing why it had ruled against him, as required by the arbitration process. The district court granted both of the defendants' motions for summary judgment. The union's summary judgment motion was granted based on the statute of limitations having run, and the airline's motion was granted on the grounds that the plaintiff's claims were subject to arbitration under the RLA. The plaintiff then appealed.

The court first looked to whether it had jurisdiction to hear the cause of action. The court found that the arbitration process set up by the RLA had not been satisfied because the Board had not issued a written decision.[40] The federal appeals court found that the district court did not have jurisdiction to review the plaintiff's claims against the airline and the union.[41] The court remanded the case to the district court for the limited purpose of issuing an order compelling the Board to issue a written decision resolving the plaintiff's grievance.[42]

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[37] *See id.* at 841.

[38] *Id.* (citing Keehr v. Consolidated Freightways of Del., Inc., 825 F.2d 133, 138 n.6 (7th Cir. 1987)).

[39] 89 F.3d 635 (9th Cir. 1996).

[40] *See id.* at 639.

[41] *See id.*

[42] *See id.* at 640.

B. Airline Deregulation Act Preemption

The plaintiffs in *Ellis v. United Airlines, Inc.*[43] were two flight attendants who lost their jobs when their former employer, Frontier Airlines, went into bankruptcy. When United refused to hire them as flight attendants, they filed suit, contending that United's refusal violated the Age Discrimination in Employment Act (ADEA)[44] and the Airline Deregulation Act (ADA).[45] United claimed that it rejected the plaintiffs' applications because they failed to meet the weight requirements for new flight attendant hires.

The court found that the ADEA provides that "it shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[46] Plaintiffs maintained in their ADEA argument that the airline intentionally discriminated against them because of their age. Plaintiffs also maintained that United's use of an age-neutral weight requirements for hiring, even if not motivated by discriminatory purposes, disparately impacted them because of their age.

For a plaintiff to prevail on a disparate treatment claim under the ADEA, she must show that age actually motivated the employer's decision not to hire her.[47] The court found no direct evidence of any discriminatory intent.[48] Plaintiffs, instead, pointed to circumstantial evidence. The court found that where a discrimination claim rests on circumstantial evidence, a plaintiff must show: "(1) they were within the protected age group; (2) they were not hired; (3) they were qualified for the position; and (4) [that the employer] filled the positions with younger applicants."[49] United claimed that the plaintiffs failed to establish evidence that they met the third requirement—that they were qualified for the flight attendant positions because they did not meet the airline's weight standards for new hires. The

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[43] 73 F.3d 999 (10th Cir. 1996).

[44] 29 U.S.C. § 621-34 (1994).

[45] 49 U.S.C. § 42101-03 (1994).

[46] *Ellis*, 73 F.3d at 1003 n.4 (quoting 29 U.S.C. § 623(a)(1) (1994)) (alteration in original).

[47] *See id.* at 1004.

[48] *See id.*

[49] *Id.* (citing Cooper v. Asplund Tree Expert Co., 836 F.2d 1544, 1547 n.1 (10th Cir. 1988)).

court concluded that even if the plaintiffs did establish a prima facie case, the plaintiffs still lost because they produced no evidence that United selectively applied its weight standards only to older applicants and hired younger applicants who failed to meet those standards.[50] Additionally, the court found that the "[p]laintiffs have not shown that they actually met the weight guidelines and, thus, must have been rejected for some other reason."[51]

The court then moved to the disparate impact argument. Plaintiffs claimed, in the alternative to the disparate treatment claim, that the "hiring decisions violated the ADEA because the decisions were based on weight requirements that disparately impacted older job applicants."[52] The court found that disparate impact claims "challenge 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'"[53] The court cleared up the uncertainty about whether disparate impact claims could be brought under the ADEA when it stated: "[W]e now . . . hold that disparate impact claims are not cognizable under the ADEA."[54] The court, in making this decision, looked to the plain language of the ADEA itself, the legislative history of the ADEA, subsequent amendments to the ADEA by Congress, Supreme Court decisions on the ADEA, and treatment given to the ADEA by other courts.

Plaintiffs also claimed that United violated the ADA by not hiring the plaintiffs, as required their by the statute. Under the ADA, a "protected employee" who loses their job as a result of deregulation of the airline industry becomes a "designated employee" and is entitled to a right of first hire by other carriers.[55] However, under Department of Labor regulations promulgated pursuant to the ADA, applicants must meet the applicable prerequisites or qualifications determined by the airline for a vacancy with the exception of initial hiring age.[56] The court stated, "[a]s a general matter, weight requirements are permissi-

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[50] *See id.* at 1006.

[51] *Id.* at 1005.

[52] *Id.* at 1006.

[53] *Id.* (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993)).

[54] *Id.* at 1007.

[55] *See id.* at 1010 (citing the Americans with Disabilities Act, 49 U.S.C. §§ 42101(a)(3), 42103(a) (1994)).

[56] *See id.* (citing 29 C.F.R. §§ 220.20(a), 220.21(a)(1) (1996)).

ble job-related criteria for flight attendants."[57] Thus, the court also dismissed the ADA claim.

The litigation in *Abdu-Brisson v. Delta Air Lines, Inc.*[58] arose when Delta bought certain Pan Am World Airways assets in 1991. Among those assets were 774 former pilots for Pan Am. The plaintiffs, 488 of those 774 pilots, brought suit under the New York State Human Rights laws and the New York City Human Rights law, alleging discrimination. They alleged violations of the terms and conditions of their employment based on their age regarding the methods used by Delta to integrate them into pilot seniority, medical benefits, and pay increases in relation to that of existing Delta pilots. Delta filed a motion to dismiss claiming that their allegations were preempted by the ADA. The court identified a two-part test for ADA preemption of state law claims: "First, the state law claim must involve the enforcement of a state law. Second, the state law must have a connection with or relation to airline prices, routes, or services."[59]

The court found that the first part of the test was satisfied because the plaintiffs did not dispute that the action seeks to enforce a state statute.[60] The court stated that the real issue was whether the state human rights law and the city human rights law related to prices or services as identified in the ADA.[61] Delta argued that any changes it would have to make to its retirement plans in accommodating the plaintiffs' claims would have a large economic impact on its fares. The plaintiffs argued, however, that if such an impact occurred, it would be too insignificant to warrant preemption. The court concluded that the ADA preempted the plaintiffs' claims because "the order of a pilot seniority list has a connection with and therefore is 'related to' the provision of air carrier services. . . . Indeed, pilot staffing is an integral element of the 'transportation itself.'"[62]

C. Due Process

The matter of *Clarry v. United States*[63] was brought by former air traffic controllers fired by President Reagan after they participated in a 1981 strike. The litigation ensued after the govern-

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[57] *Id.*
[58] 927 F. Supp. 109 (S.D.N.Y. 1996).
[59] *Id.* at 111.
[60] *See id.*
[61] *See id.*
[62] *Id.* at 112.
[63] 85 F.3d 1041 (2d Cir. 1996).

ment's allegedly abusive treatment of the air traffic controllers. After the strike was over, the Office of Personnel Management (OPM), pursuant to directions from President Reagan, said that it was barring strikers from working for the federal government for three years and further said that it was barring the air traffic controllers from working with private companies under contract with the Federal Aviation Administration (FAA). Plaintiffs filed suit claiming that the latter policy violated their right to due process and equal protection. Additionally, the plaintiffs claimed that the OPM directive barring them from working with the FAA deprived them of a protective property interest without due process. The court dismissed the former stating, "Congress made it clear that any person who participates in a strike against the federal government has no right to federal employment."[64] Further, the court stated that it agreed with the OPM that President Reagan had intended to bar the strikers from working indefinitely for the FAA.[65] Lastly, the court rejected the plaintiffs' argument that they possessed a Fifth Amendment property interest and the right to employment with the FAA.[66]

The plaintiffs also claimed that the OPM's prohibition on the plaintiffs' working again for the FAA violated the OPM's regulations regarding such matters. The court disagreed, stating, "the President, acting under his statutory authority to regulate federal employment, may issue a directive overriding that regulation."[67]

Plaintiffs further claimed that the OPM violated the Administrative Procedure Act's requirements of notice and comment rulemaking procedures. The court disagreed with this, stating that what the OPM had done was interpret a rule rather than create a legislative rule.[68] Thus, it made interpretive rule exempt from the Administrative Procedure Act's rulemaking procedures.[69]

The court then stated that the plaintiffs did not have standing to pursue their claim regarding the prohibition against employment with private entities under contract with the FAA.[70] The court found that they lacked standing because the FAA policy

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[64] *Id.* at 1046.
[65] *See id.*
[66] *See id.*
[67] *Id.* at 1047 (citation omitted).
[68] *See id.* at 1048.
[69] *See id.* at 1049.
[70] *See id.*

had been repealed and because the plaintiffs had not shown any injury by enforcement of the policy.[71]

The plaintiff in *Linney v. Turpen*[72] was a former airport police officer suspended after an investigation involving a lost bracelet raised suspicions regarding his involvement in the matter. The plaintiff was suspended after a dismissal hearing during which there was an inquiry to uncover statements the plaintiff made during the investigation. Although the plaintiff admitted that he was lying during the investigation, he maintained that the method in which his dismissal hearing officer was selected deprived him of due process. The court found no merit in the plaintiff's claim and supported its ruling on four grounds.[73] First, the plaintiff did not use the proper procedure to protest the selection of the hearing officer.[74] Therefore, he was precluded from challenging this process on appeal. Second, the plaintiff was given notice of the proposed action, the grounds for doing so, the charges and materials upon which the action was based, and the opportunity to respond in opposition to the action.[75] Third, the hearing officer was a reasonably impartial and uninvolved reviewer of the charges before the plaintiff.[76] Fourth, the plaintiff never showed any actual bias on the part of the hearing officer.[77] The court, thus, affirmed the original holding.[78]

D. Labor Laws

The plaintiff in *Rodriguez v. Iberia Lineas Aereas de Espana*[79] sought overtime pay for work he had done during overtime hours, mealtime, and the Puerto Rican day of rest as an employee of Iberian Airlines. He sought this overtime on the basis of the Puerto Rican labor laws.[80] However, Iberian claimed that because the plaintiff was both an administrator and executive of the airline, he was exempt from the labor laws. The court applied two tests to determine his status. To satisfy the administra-

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[71] *See id.*
[72] 49 Cal. Rptr. 2d 813 (Cal. Ct. App. 1996).
[73] *See id.* at 817.
[74] *See id.*
[75] *See id.*
[76] *See id.* at 818.
[77] *See id.*
[78] *See id.*
[79] 923 F. Supp. 304 (D.P.R. 1996).
[80] *See* P.R. Laws Ann. 29 §§ 295 (1985 & 1991 Supp.).

tor test, the defendant must show that "(1) [the] plaintiff performed office or non-manual work directly related to (a) management policies, (b) Iberia's general business operations, or (c) Iberia's customers; and (2) [p]laintiff customarily and regularly exercised discretion and independent judgment."[81] Whereas, to satisfy the executive test, the defendant must show that: "(1) [the] [p]laintiff's primary duty consisted of managing Iberia's enterprise or a customarily recognized department or subdivision of Iberia; and (2) [the] [p]laintiff customarily and regularly directed the work of two or more employees of the enterprise, department, or subdivision."[82]

The court analyzed the plaintiff's job duties and functions and found that his employment was an integral part of the direction and function of Iberian's operations at the airport.[83] The court found that the plaintiff was given a lot of discretion by the airline to make decisions critical to the degree of success Iberian experienced at the airport. The court concluded that because of the plaintiff's status in Iberia's operations at the airport and his direction of the operations there, he was an administrator and an executive and, thus, exempt from the Act's overtime provisions.[84]

E. Family and Medical Leave Act of 1993

The plaintiff in *Rich v. Delta Air Lines, Inc.*[85] filed suit alleging that Delta suspended and fired her in violation of the Family and Medical Leave Act of 1993 (FMLA).[86] Delta hired the plaintiff as a flight attendant in June 1987. For each flight on which she worked, she was required to sign in between sixty and ninty minutes prior to the departure time for the flight. When the plane stopped at the gate at the conclusion of the flight, the time was referred to as a "block-in time." After the block-in time, plaintiff would perform duties such as saying "good bye" to the passengers and engage in debriefing sessions with the flight crew. The plaintiff claimed that such duties took approximately twenty to thirty minutes. After the deplaning duties, the plaintiff would either wait at the airport to work another flight or be released from duty. Her duty hours were comprised of the

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[81] *Rodriquez*, 923 F. Supp. at 311 (citation omitted).
[82] *Id.* at 312 (citation omitted).
[83] *See id.* at 314.
[84] *See id.*
[85] 921 F. Supp. 767 (N.D. Ga. 1996).
[86] 29 U.S.C. § 2611 (1994).

hours between her sign-in through the block-in time. The time spent on deplaning duties was not calculated in her duty hours.

From August 1993 until April 1994, the plaintiff missed many days from work because of a chronic respiratory tract infection, inflammation of the gums, pelvic endometriosis, and dysplasia of the cervix. The plaintiff contended that such time off was covered by the FMLA. However, on April 23, 1994, Delta suspended the plaintiff without pay for excessive absenteeism and for allegedly falsifying a doctor's certificate to explain one of her absences. Delta later fired her on May 20, 1994, for the same reasons. The plaintiff filed suit and claimed she should have qualified under the FMLA. After she filed suit, Delta filed a motion for summary judgment alleging that she was not an "eligible employee" under the FMLA and, thus, not entitled to its benefits.

The court analyzed the FMLA and found that an employer must allow an eligible employee to take off up to twelve work weeks of time during any twelve-month period for serious health problems.[87] The court determined that "[a]n eligible employee is one who has worked for a covered employer for at least twelve months, has worked at least 1,250 hours during the previous twelve months, and has been employed at a worksite where there are at least fifty or more employees within a seventy-five mile radius."[88] Delta alleged that the plaintiff had not worked the requisite hours to qualify for protection under the FMLA. The court stated that the FMLA directs courts to calculate the hours of service according to the Fair Labor Standards Act (FLSA).[89] The United States Supreme Court clarified the FLSA's definition of working time in *Skidmore v. Swift & Co.*[90] as time spent "predominantly for the employer's benefit or for the employee's."[91] The federal district court interpreted this as meaning "hours spent by an employee engaged in her principal work activities are considered to be hours worked under the FLSA."[92]

The court found that because Delta had not maintained records of the time the plaintiff spent during deplaning activities, the plaintiff is presumed to have worked the necessary 1250

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87 *See Rich*, 921 F. Supp. at 772 (citations omitted).

88 *Id.*

89 *See id.* (citing 29 U.S.C. § 2611(2)(C) (1994)).

90 323 U.S. 134 (1944).

91 *Id.* at 137.

92 *Rich*, 921 F. Supp. at 772 (citations omitted).

hours. "To overcome this presumption, the defendant must clearly demonstrate that the employee did not work 1,250 hours during the previous twelve months."[93] In determining the correct amount of time to be attributable to plaintiff, the court found the time the plaintiff spent on layovers should not be included in that calculation.[94] Without the layover time included, the court determined that the twenty to thirty minutes deplaning time, when calculated with her regular duty hours, still did not add up to the 1250 hours of service necessary for FLMA coverage. Therefore, the court granted Delta's motion for summary judgment.[95]

F. Racial Discrimination

The plaintiff in *Landon v. Northwest Airlines, Inc.*[96] was a black male employed at Northwest. After the plaintiff was involved in a conveyor belt incident, he was required to undergo a drug test. The results were positive for marijuana and the plaintiff was fired. The plaintiff brought suit against Northwest alleging four causes of action: (1) that he was fired for racially motivated purposes; (2) that Northwest's refusal to rehire him was in retaliation for his legal actions against the airline; (3) that the drug testing was an invasion of his privacy; and (4) defamation. Northwest moved for summary judgment.

The court addressed plaintiff's allegation that he was fired for racially motivated purposes by stating that: (1) he was part of a protected class; (2) he was qualified for the job position; (3) there was adverse action taken against him; and (4) the evidence allowed an inference of improper motivation on behalf of Northwest.[97] The court found that all four prongs were satisfied.[98] The burden then shifted to Northwest to show a legitimate business reason for their dismissal of the plaintiff. The court found that Northwest had reasonable suspicion of drug use by the plaintiff because of the results of the drug test.[99] The burden then shifted to the plaintiff to show that the defendant's reason was (a) a pretext and (b) unlawful discrimination. The court concluded that there was insufficient evidence presented

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[93] *Id.* at 773 (citing 29 C.F.R. § 825.110(c)).
[94] *See id.* at 777.
[95] *See id.* at 778.
[96] 72 F.3d 620 (8th Cir. 1995).
[97] *See id.* at 624.
[98] *See id.*
[99] *See id.*

by the plaintiff to show that there was the pretext to discriminate.[100]

The court then addressed plaintiff's claim that Northwest refused to rehire the plaintiff in retaliation for his bringing legal action against the airline. The court found that the evidence did not show that he was not rehired for retaliatory purposes, but rather, because he failed to meet the conditions Northwest had set to rehire. The court ruled in favor of Northwest on both points.[101]

The court upheld summary judgment against the plaintiff on his remaining two claims, finding that public safety considerations were sufficient countervailing interests to justify drug testing, and that the truth of the statement regarding the drug test was an absolute defense to the plaintiff's claim for defamation.[102]

As reported on the front page of the *Wall Street Journal*, Captain Wayne O. Witter, or Captain WOW as he liked to be called, was a Delta Air Lines pilot for over twenty years.[103] Currently, his status is very uncertain. Captain Witter has been described as "stubborn, pompous, self-centered, domineering, belligerent, and aggressively intimidating," but he is also respected for his piloting abilities. In fact, his second wife, whom he stuck in the face with a fork, said that if she was in an airline emergency, she would want Captain Witter in the pilot's seat because of his take charge personality. It is that personality that has Captain Witter, Delta Air Lines, and a physician to whom Delta referred Captain Witter embroiled in litigation as to whether he should be permanently removed from the skies.

Captain Witter's first twenty years with Delta, coming after a tour of duty in Vietnam, were nearly spotless. However, in July of 1981, he was reprimanded for drinking a vodka and grapefruit juice drink sixteen hours before he was to fly. Six years later he was suspended for six weeks when he said over a loudspeaker to a full plane, "I've already got your money, so shut the f— up."[104] Unfortunately for Captain Witter, an FAA inspector was on board at the time. Although he claimed the broadcast was unintentional, he was still suspended.

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100 *See id.* at 624-25.

101 *See id.* at 625-26.

102 *See id.* at 627-28.

103 *See* Martha Brannigan, *Captain WOW: When is Mental State of a Pilot Grounds for Grounding Him?*, WALL ST. J., Mar. 7, 1996, at A1.

104 *Id.*

After those relatively minor violations, he began to have medical problems in the late 1980s. In 1988, he was diagnosed with sleep apnea (interrupted breathing), a condition which, if untreated, can cause daytime drowsiness. He was grounded while this problem was evaluated and treated. Things went fairly smoothly for Captain Witter for the next year and a half. Then in February of 1992, after having an argument with his wife, he went to his bedroom where he kept his gun and said, "I'm going to end it for both of us."[105] He was put in psychiatric hospitals for a month, at which time he was first diagnosed as having personality disorder. One doctor concluded that "he is at a rather high risk of engaging in some type of impulsive or emotional outburst which could have some disastrous consequences."[106]

Three months later, his attending physician said that Captain Witter was ready to go back to work for Delta. In early 1993, the FAA recertified him. Delta, however, sent him to Dr. Berry, known to pilots as the "dreaded Dr. Berry"[107] because of his tough reputation for grounding pilots. Dr. Berry, however, also pronounced the captain ready to fly. Upon returning to the skies, the captain flew smoothly. However, four months into his return, problems resurfaced. On an assignment in Europe, he and two other crew members clashed repeatedly, with the conflict reaching a zenith at the gate in Frankfurt, Germany, where the second officer reported to superiors that the captain had "a screaming fit in the cockpit."[108] He added, "Captain Witter's terribly bitter attitude along with his violent and aggressive personality make it extremely difficult for the other crew members to perform their duties . . . I am extremely concerned that all these character traits combined will some day result in disaster and great loss of life."[109] Captain Witter, on the other hand, stated that he had simply been giving the flight engineer "a Marine Corps butt chewing."[110]

Delta again became suspicious of Captain Witter's possible unsafe personality and assigned monitors to fly with him, all of whom stated that his behavior was fine. Delta then sent him back to Dr. Berry. The doctor found the captain to be "'hypomanic in his talkativeness,' saying that he kept quoting Bible

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105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*

passages and winking at him, but that the verses had no relevance."[111] Dr. Berry concluded that the captain had a "narcissistic personalty disorder,"[112] a psychiatric condition that is sufficient to disqualify airline pilots under FAA rules. Finally, on March 5, 1994, Captain Witter was suspended. He has been placed on medical disability at half-pay ever since.

Captain Witter then filed suit against Delta and Dr. Berry. He sought reinstatement as a senior captain, which pays about $180,000 a year, in addition to damages. He says the four-year ordeal has been more financially and mentally stressful to him than all of his time in Vietnam. Delta claimed that they cannot take chances when it comes to safety.[113]

On December 1, 1995, a National Transportation Safety Board judge ordered the FAA to reissue Captain Witter's medical certificate.[114] The judge found that the problems with his wife and the crew incident in Frankfurt were not sufficient signs of mental disorder. He said that the cockpit clash was "the first and only incident of this sort in [his] otherwise exemplary flying record,"[115] and that he believed that all three crew members shared the blame. The FAA filed an appeal to a full NTSB board.[116]

II. NEGLIGENCE

A. AIRCRAFT CRASHES

The case of *Cappello v. Duncan Aircraft Sales of Florida, Inc.*[117] involved an aircraft that made a night-time departure from a San Diego airport and subsequently crashed into a mountain two or three minutes into the flight. The question for the court to decide was whether the air traffic controllers with whom the pilot had been in contact before and during this ill-fated flight were negligent in not warning the pilot of mountains along his flight path.[118]

The court found that the key factors in this case were that the pilot took off at night, and that he was unfamiliar with the sur-

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111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 79 F.3d 1465 (6th Cir. 1996).
118 *See id.* at 1467.

rounding terrain.[119] Because he was flying under visual flight rules, he was not required to stay in contact with the air traffic controllers nor were they required to stay in contact with him. In analyzing the instrument flight rules-visual flight rules relationship between the pilot and the air traffic controller, the court observed, "There are detailed sets of assumptions, customs and patterns of conduct shared by pilots and FAA flight assistants, and in the end, the comparative negligence problem in this case is about whether the FAA employees failed to comply properly with this set of shared assumptions and expectations."[120]

By taking off pursuant to visual flight rules, the court thought that the pilot had assumed the responsibility for being aware of the surrounding terrain and the circumstances in which he was flying. The court quoted another court in a similar case, *Biles v. United States*:[121] "[C]ontrollers must be able to assume that pilots are complying with FAA regulations and understand their circumstances in the absence of a pilot request or other notice to the contrary."[122]

The court looked specifically at the communications between the pilot and the flight specialist. Since the pilot said he did not have the required charts showing the recommended departure routes, the flight specialist then read the departure plate to the pilot word for word. In analyzing their interaction, the court determined that the flight specialist had done the most with what little information he had been given by the pilot. "There is no basis whatever [sic] for a finding that [the flight specialist's] conduct was negligent or a valid proximate cause of the pilot's mistakes."[123]

The court then turned to the interaction between the pilot and the departure controller with whom the pilot came in contact after he had taken off. The court again felt that the departure controller had merely done his job and was unable to do what the plaintiff claimed he should have been doing for the pilot in providing collision avoidance systems. The entire time the pilot was in contact with the departure controller, he had not squawked an identification code, nor been placed on the departure controller's radar screen, so that technically he was

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[119] *See id.* at 1468.
[120] *Id.* at 1468.
[121] 848 F.2d 661 (5th Cir. 1988).
[122] *Cappello*, 79 F.3d at 1469.
[123] *Id.* at 1472.

not under the control of the departure controller. Because of this fact, the departure controller could not possibly have been negligent, as he had no responsibilities to an aircraft over which he had no control.[124]

The decedents in *Cohen v. Lowe Aviation Co.*[125] died when their Cessna 172 crashed while they attempted take off. The decedents' estate sued the defendant in a wrongful death action, alleging that Lowe Aviation negligently failed to maintain the plane and that an employee of Lowe Aviation was negligent in failing to provide adequate flight supervision. The decedents' estate appealed a jury verdict for the defendant.

The plaintiffs' first issue on appeal was that the trial court erred in disallowing them to introduce evidence showing that the plane's seat was defective. The seat slipped backwards during take off and caused a stall, which caused the crash. The Georgia appellate court found that all the evidence had been adequately presented and that the jury had sufficient evidence on which to base its verdict. The plaintiffs also maintained that the trial court allowed bias and prejudice to taint the jury verdict. More specifically, they alleged that there were impermissible references to the decedents' Jewish religion and economic status which supposedly biased the jury against him. The court found that because no objections had been made during the jury trial, the court had nothing to review as the issues were not preserved for appellate review.[126]

The defendant in *Egan v. Omniflight Helicopters, Inc.*[127] was a provider of helicopter transportation. Co-defendant Southern Tier Air Rescue (STAR) was a provider of emergency medical services and patient care. To supplement its existing emergency medical services, STAR entered into an agreement with Omniflight Helicopters (Omniflight) whereby Omniflight would provide helicopter transportation for STAR's personnel and patients. The decedent was a helicopter pilot employed by Omniflight who was killed while flying a contract flight for STAR.

The plaintiff, the administrator of the decedent's estate, brought a negligence action against Omniflight and STAR alleging that STAR had been negligent in allowing the decedent to

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[124] *See id.* at 1474.

[125] 470 S.E.2d 813 (Ga. Ct. App. 1996).

[126] *See id.* at 815.

[127] 639 N.Y.S.2d 77 (N.Y. App. Div. 1996).

pilot the helicopter when STAR knew or should have known that the decedent lacked the necessary piloting skills. STAR moved for summary judgment to dismiss the complaint as it applied to STAR. The lower court denied STAR's motion.

On appeal, the court stated that "'elemental to any recovery in negligence' is that the tortfeasor owe a duty of reasonable care to an injured party."[128] Because of this, the court observed that such a duty requires "an examination of an injured person's reasonable expectation of the care owed and the basis for the expectation and the legal imposition of a duty."[129] The court determined that it would have been unreasonable for the decedent to expect STAR to owe him a duty to essentially protect him from himself.[130] The court also found no evidence of such a duty in the contract between STAR and Omniflight.[131]

The court also stated that STAR was not responsible for any negligence on the part of Omniflight because of Omniflight's status as an independent contractor. The court stated that an employer such as STAR is not liable for the acts of the independent contractors it hires.[132]

The decedent in *Blome v. Aerospatiale Helicopter Corp.*[133] was a coast guard inspector killed when the helicopter in which he was riding crashed in the Gulf of Mexico. The decedent's estate filed suit for recovery under Texas's wrongful death statute. The defendant, the manufacturer of the helicopter, moved for summary judgment, alleging that the claim was governed by the Death on the High Seas Act (DOHSA),[134] which has been held to prohibit punitive and non-pecuniary damages.

The court stated that DOHSA was applicable when deaths occur "beyond a marine league [three nautical miles] from the shore of any State."[135] The evidence showed that the crash occurred seven to eleven miles from the coast of Texas. The plaintiff maintained, however, that the territorial boundary of Texas is three marine leagues offshore and the court agreed.[136] Thus, a question of fact remained as to whether the accident occurred

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128 *Id.* at 78 (citations omitted).
129 *Id.* (citations omitted).
130 *See id.*
131 *See id.*
132 *See id.*
133 924 F. Supp. 805 (S.D. Tex. 1996).
134 46 U.S.C. App. §§ 761-67 (1994).
135 *Blome*, 924 F. Supp. at 808 (quoting 46 U.S.C. App. § 761).
136 *See id.* at 814.

within the state boundary, rendering summary judgment inappropriate.

B. Air Carrier Negligence

The plaintiff in *Travel All Over The World, Inc. v. Saudi Arabia*[137] was a travel agency which made travel arrangements for people wishing to make the journey to the Hajj religious event. Travel All Over The World's (TAOW) travel arrangements provided that the passengers were to fly to New York where they would connect with a Saudi Arabian Airlines (SAA) flight. However, the flight to New York was delayed by weather, which resulted in many passengers missing the SAA flight. When the passengers attempted to rebook the flight, SAA required them to repurchase the tickets through SAA rather than TAOW, thus causing TAOW to lose its commission on the ticket sales. TAOW then filed suit alleging that SAA made false representations about the plaintiff to the rebooking passengers. SAA allegedly told TAOW's clients that TAOW was not a reputable company, that TAOW had not booked all the seats it claimed it had, and that TAOW was known for lying to its clients. TAOW's suit alleged seven counts: (1) breach of contract; (2) tortious interference with a business relationship; (3) defamation; (4) slander; (5) fraud; (6) intentional infliction of emotional distress; and (7) additional tortious interference with a business relationship after the litigation ensued. SAA maintained that all of TAOW's claims were preempted by the Airline Deregulation Act (ADA). The lower court accepted this argument and dismissed TAOW's complaint.

The Seventh Circuit Court of Appeals applied the United States Supreme Court's decisions in *Morales v. Trans World Airlines, Inc.*[138] and *American Airlines v. Wolens*,[139] in which the scope of ADA preemption was more precisely drawn.[140] After analyzing the *Morales* and *Wolens* decisions, the Seventh Circuit identified "two distinct requirements for a law to be expressly preempted by the ADA: (1) A state must 'enact or enforce' a law that (2) 'relates to' airline rates, routes, or services, either by

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137 73 F.3d 1423 (7th Cir. 1996).

138 504 U.S. 374 (1992).

139 513 U.S. 219 (1995).

140 *See Travel*, 73 F.3d at 1430.

expressly referring to them or by having a significant economic affect upon them."[141]

With that preemption standard, the court turned to the breach of contract count. The court followed *Wolens* and stated that the count was not preempted: "[T]he plaintiffs here are not alleging a violation of state-imposed obligations, but rather are contending that the airline breached a self-imposed undertaking."[142] Thus, the court held that the breach of contract count was not preempted by the ADA.

The court next turned to the slander and defamation counts. The court looked again to *Morales* and *Wolens* and held that for an ADA preemption to occur, a tort claim must refer to or have a connection with airline rates, routes, or services. Here, the court concluded that SAA's statements were not part of any contractual relationship between SAA and TAOW, nor did they expressly refer to airline rates, routes, or services. Thus, the court held that the defamation and slander counts were not preempted.[143]

The court then looked at the other intentional tort counts. The court determined that those counts referred to airline "services"—the ticketing and transportation provided by the airline itself.[144] The court looked to the underlying nature of the actions taken rather than the manner in which they were accomplished to determine if such actions were related to airline services for the purposes of ADA preemption. The court concluded that the counts were preempted to the extent that SAA's actions related to SAA's refusal to transport passengers who had booked travel with TAOW because they related to SAA services.[145]

The cause of action in *Capacchione v. Qantas Airways, Ltd.*[146] arose when the plaintiffs flew from Los Angeles to Sydney, Australia, on Qantas Airlines. Pursuant to Australian regulations, Qantas was required to spray the interior of the aircraft with an insecticide called Permethrin to prevent alien insects from infecting Australia. All Qantas flights were treated with the insecticide. The plaintiff sued for injuries that she allegedly suffered as a result of exposure to Permethrin on both legs of the flight. On the original flight from Los Angeles to Sydney, plaintiff did

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141 *Id.* at 1432.

142 *Id.*

143 *See id.* at 1433.

144 *See id.* at 1434.

145 *See id.*

146 25 Av. L. Rep. (CCH) ¶ 17,346 (C.D. Ca. 1996).

not ask, and Qantas did not tell her anything, about an insecticide treatment. During and after the plaintiff's flight, she experienced itchiness and dizziness, and upon her arrival she had symptoms of fatigue, nausea and a metallic taste in her mouth. Before returning to Los Angeles, plaintiff contacted Qantas customer service representatives to inquire whether the insecticide would be sprayed on the aircraft of her next flight. She was assured that the plane would not be sprayed. However, on her return flight, the plaintiff experienced the same symptoms as before and then discovered that the plane had been sprayed.

The court first addressed the plaintiff's claim of negligent exposure to pesticide. The court determined that the plaintiff's ticket tariff applied because it provided, in part, that the "[c]arrier is not liable for any damage directly and solely arising out of its compliance with . . . government [laws and] regulations . . . ."[147] The court pointed out that Australian regulations require the application of the pesticide to the airplane.[148] Although plaintiff could still recover if she could show that the Warsaw Convention barred such provisions of the tariff, the court determined that there is no claim under the Convention because the incident was not an "accident" as defined in the Convention.[149] Therefore, the tariff provisions applied, and the plaintiff was denied recovery.[150]

The plaintiff next claimed negligent failure to warn of the risk of exposure to the insecticide. After it decided that the Warsaw Convention and the ADA could not preempt the plaintiff's cause of action for duty to warn, the court decided that the plaintiff's claim failed because plaintiff failed to show that Qantas's failure to warn was unreasonably dangerous to the plaintiff.[151] The court then dismissed the plaintiff's contract claim but allowed litigation on her misrepresentation claim to go forward.[152] The court stated, "[G]iven the high standard of care owed by a common carrier like Qantas to its passengers, there is an argument that the Qantas supervisor was at least negligent in not telling Cappachione that the cabin had been treated with Permethrin . . . ."[153]

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147 *Id.* ¶ 17,348.
148 *See id.*
149 *See id.* ¶ 17,349.
150 *See id.*
151 *See id.* ¶ 17,351.
152 *See id.* ¶ 17,354.
153 *Id.*

The litigation in *Stanford v. Kuwait Airways Corp.*[154] arose when terrorists hijacked Kuwait Airways Flight KU221 bound for Karachi, Pakistan, and diverted it to Tehran, Iran. During the course of the hijacking, the terrorists killed two Americans and tortured two others. The estates of the two deceased Americans and one of the survivors brought a negligence suit against Middle Eastern Airlines (MEA) alleging that the airline's negligence was the proximate cause of the plaintiffs' injuries. The plaintiffs appealed from the district court's decision granting MEA judgment as a matter of law on the ground that MEA's actions were not the proximate cause of the injuries that occurred because of the hijacking. In their appeal, the plaintiffs argued:

> (1) MEA had a duty to use due care to avoid the risk of hijacking within [an airline] interline system; (2) there was sufficient evidence for a jury to conclude that the failure of MEA to use due care was a proximate cause of the injuries; and (3) the foreseeable negligence of (a) the security officials at Dubai and (b) Kuwait Airways were not intervening acts breaking the causal link between MEA and the injuries and deaths.[155]

After the court decided that it would apply regular concepts of common law regarding liability to adjudicate the matter, it attempted to answer the question of "[whether] the circumstances in this case create a duty on the part of MEA to protect [the plaintiffs.]"[156] To decide whether a duty existed, the court looked to (1) the relationship among the parties; and (2) the reasonable foreseeability of harm to the person injured.[157] The court first examined the relationship among MEA and the victims. The court stated that "[p]laintiffs demonstrated that MEA joined an enterprise with interline airlines, including Kuwait Airways, to facilitate travel among the cooperating carriers. MEA's participation in interline arrangements with other IATA airlines was a lucrative venture."[158] The court found that MEA knew or should have known of the warning issued by the Security Advisory Committee of IATA of the possibility that terrorists would board airlines at airports with low security measures and transfer to other airlines at airports with tighter security.[159] The court concluded that "a jury could reasonably find that when

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[154] 89 F.3d 117 (2d Cir. 1996).
[155] *Id.* at 122.
[156] *Id.* at 123.
[157] *See id.* at 123-25.
[158] *Id.* at 124.
[159] *See id.*

MEA accepted interline passengers aboard its planes in Beirut, it knew or should have known that there was a danger that terrorists would try to board their airline only to transfer later to a vulnerable, interline target airplane."[160]

The court then looked to the reasonable foreseeability of harm to the persons injured. The court identified evidence that MEA knew of threatened attacks by terrorists, that the practice of terrorists boarding flights in unsafe airports and transferring to other airlines was taking place, that the Beirut Airport had very little security, and that the hijackers' behavior should have been viewed with suspicion.[161] Thus, "[a] jury could reasonably find . . . that if MEA did nothing, it would create a zone of risk that stretched at least as far as the innocent passengers aboard flights with which the four hijackers would eventually connect."[162] The court concluded that

> MEA, as a first leg interline carrier, had a duty to protect passengers on other interline connecting flights from unreasonable risk of harm through the use of reasonable precautions in the face of reasonably foreseeable risks. MEA was faced with a set of circumstances that a jury could reasonably find created a foreseeable risk, necessitating some action to protect others from an unreasonable threat of hijacking.[163]

The court turned to the lower court's holding that the plaintiffs had failed to prove that MEA's inaction was the proximate cause of the deaths and injuries. The court of appeals disagreed, finding that there was sufficient evidence so that fair minded jurors could arrive at a verdict against MEA.[164] The plaintiffs presented evidence showing that the hijackers were able to board the Kuwait Airways jet through unguarded rear stairs and that the practice in the Middle East of allowing one passenger to check-in for others was common. Thus, the court concluded that a reasonable juror could have found that MEA's behavior could have been the proximate cause of the deaths and injuries of the Americans onboard the hijacked flight.[165]

The court in *Danese v. Delta Air Lines, Inc.*[166] denied defendant Delta's motion for summary judgment because a material issue

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160 *Id.*
161 *See id.* at 125.
162 *Id.*
163 *Id.*
164 *See id.* at 126.
165 *See id.* at 127.
166 No. 95 Civ. 5462 (SHS), 1996 WL 67869 (S.D.N.Y. Feb. 15, 1996).

of fact remained in dispute.[167] The cause of action arose when the plaintiff, upon disembarking at Boston's Logan Airport, slipped on a patch of ice and fractured her ankle while walking from the plane to the terminal building.

The court applied New York choice of law principles and found that Massachusetts law applied because it was the situs of the alleged tort. Under Massachusetts law, "[a] landowner owes a single duty of reasonable care to all persons lawfully on his premises."[168] Generally, this duty of care is not breached when a landowner "provides a reasonably safe 'route of access' to its premises."[169]

Delta, in its motion for summary judgment, claimed that it did not breach its duty of care. The plaintiff maintained that she saw the ice before she stepped on it, and that the ice patch covered the entire width of the walkway. She claimed she chose not to walk outside the marked walkway because she thought it might be more dangerous to do so. Plaintiff also presented an internal Delta memorandum which instructed employees to make sure passengers remained within the marked walkway. The court determined that a pure issue of fact remained as to whether a safe alternative route was available to avoid the ice patch, and, as a result, denied the motion for summary judgment.[170]

The plaintiff in *Freedman v. Northwest Airlines, Inc.*,[171] was traveling from Tampa, Florida, to Albany, New York, on Northwest. Due to flight delays, however, plaintiff was stranded in Detroit, Michigan, for ten hours. Plaintiff brought an action for compensatory and punitive damages resulting from the delay. Defendant moved to dismiss on the basis that the tariffs printed on the plaintiff's ticket provided that in the event of such an occurrence, the sole and exclusive remedies available to the plaintiff were alternative transportation or a ticket refund ticket for the unused portion.

The court stated that the sole issue was whether the exculpatory clause in the contract was valid. The court stated that "[t]he tariff constitutes the incorporated terms of the contract between passenger and airline, and 'if valid, conclusively and exclusively

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[167] *See id.* at *1.

[168] *Id.* (quoting Goldman v. United States, 790 F.2d 181, 183 (1st Cir. 1986)).

[169] *Id.* (citations omitted).

[170] *See id.* at *2.

[171] 638 N.Y.S.2d 906 (N.Y. Albany City Ct. 1996).

governs the rights and liabilities between the parties.'"[172] The court nonetheless determined that validity of the tariff is overridden by federal common law, which states that a common carrier cannot completely exculpate itself from liability. The court concluded that the terms of the tariff did not preclude the plaintiff from maintaining an action for breach of contract and negligence.[173]

The plaintiff in *Martinez v. American Airlines, Inc.*,[174] traveled from Florida to Puerto Rico on American Airlines. While in Puerto Rico, he became ill and requested immediate transportation back to Florida for emergency medical treatment. American was not able to provide a seat for the plaintiff until five days later. Unfortunately, by that time, gangrene had set into his leg, which had to be amputated below the knee.

The plaintiff brought a cause of action against American alleging that "the defendant's duty to the plaintiff was not limited to times when the plaintiff was on board the airplane, but instead extended 'throughout the journey continuing until [the plaintiff] safely arrived at his final destination, his home in Florida.'"[175] Thus, the plaintiff argued that duty required American to return the plaintiff to Florida when he fell ill and that American had a duty to do this without the plaintiff paying additional fares.

The Eleventh Circuit disregarded the plaintiff's argument that the airline had a continuing duty to reasonably and faithfully return him to Florida when he felt ill, because the airline was "engaged for point-to-point transportation, and did not have a continuing contractual or common law duty to the plaintiff for the period after the plaintiff's arrival in Puerto Rico and before his scheduled return . . . ."[176] The court affirmed the lower court's motion to dismiss.[177]

The plaintiff in *Musson Theatrical, Inc. v. Federal Express Corp.*[178] was assured by Federal Express that its economy two-day service was cheaper than its standard overnight service. However, the plaintiff claimed that the standard service was cheaper and that

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[172] *Id.* at 907 (quoting Gluckman v. American Airlines, Inc., 844 F. Supp. 151, 160 (S.D.N.Y. 1994) (citations omitted)).

[173] *See id.* at 907-08.

[174] 74 F.3d 247 (11th Cir. 1996).

[175] *Id.* at 248 (brackets in original).

[176] *Id.*

[177] *See id.*

[178] 89 F.3d 1244 (6th Cir. 1996).

the plaintiff paid a higher price for slower delivery, thus constituting fraud and misrepresentation. The district court granted Federal Express's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

The court of appeals first decided whether the dismissal under Rule 12(b)(1) was proper. The plaintiff claimed that a federal court always has jurisdiction to decide if a claim exists under federal common law. The court stated that the plaintiff must show "only that the complaint alleges a claim under federal law, and that the claim is 'substantial.'"[179] The court concluded that although the plaintiff's argument was novel, it was not frivolous, and the dismissal by the lower court was in error.[180]

The court then stated that "[t]he only dispute is whether a shipper that alleges it was injured by the fraud and deceptive advertising of an air carrier states a claim under federal common law."[181] In addition, the court found that there was a lack of any federal statute, constitutional basis, or federal common law for a fraud claim against an air carrier.[182] After examining the legislative purpose behind the ADA, the court concluded that the action was preempted: "State law fraud claims are preempted because Congress intended [the Department of Transportation] to be the sole legal control on possible advertising fraud by air carriers, and a federal common law fraud claim is inappropriate for the same reason."[183]

C. Personal Injury Actions

The case of *Continental Airlines, Inc. v. Kiefer*[184] arose out of two cases consolidated by the court to consider the extent to which the ADA preempts state common-law personal injury negligence actions brought against airlines. The ADA provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."[185]

In the first case, the plaintiff was injured when a flight attendant opened an overhead storage bin and a briefcase fell from it,

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179 *Id.* at 1248.
180 *See id.*
181 *Id.* at 1249.
182 *See id.* at 1249-50.
183 *Id.* at 1251.
184 920 S.W.2d 274 (Tex. 1996).
185 49 U.S.C. § 41713(b)(1) (1994).

striking the plaintiff on the head. Plaintiff and her husband sued Continental Airlines for negligence. The airline moved for summary judgment on the grounds that the action was pre-empted by the ADA, which the lower court granted. The court of appeals reversed and remanded the case for further proceedings.

In the second case, plaintiff's parents had purchased a $25 "meet and assist service" for the plaintiff as a part of his airline ticket, because of his mental illness. However, when the plaintiff arrived at the Dallas/Fort Worth International Airport, no one was there to meet or greet him, and he ended up in the parking lot where he was later arrested after an altercation with airport police. Plaintiff and his parents sued American Eagle Travel Service for negligence, breach of contract, and violations of the Texas State Consumer Protection Act. Continental and American moved for summary judgment on the grounds that the ADA preempted the plaintiff's claims, which a district court granted. The court of appeals reversed as to the breach of contract and negligence claims against the airlines. The airlines in both cases appealed to the Texas Supreme Court, where the court consolidated the two cases.

The Texas Supreme Court began its analysis by reviewing two recent United States Supreme Court decisions that deal with ADA preemption. In *Morales v. Trans World Airlines, Inc.*,[186] the Supreme Court held that the ADA "pre-empts the [s]tates from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes."[187] The court interpreted the language of the preempting provision as being very broad in scope and "deliberately expansive."[188] With this method of construction, the court stated, "[s]tate enforcement actions having a connection with, or reference to airline 'rates, routes, or services' are pre-empted [by the ADA]."[189] Although general consumer protection statutes were found to be preempted, the court did not rule out *all* state actions. Concerning state advertising restrictions on air fares, the court allowed that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have

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186 504 U.S. 374 (1992).

187 *Id.* at 378.

188 *Id.* at 384 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987)).

189 *Id.*

[a] pre-emptive effect."[190] The court cited a prohibition against obscenity in advertising as an example.

In *American Airlines, Inc. v. Wolens*,[191] the United States Supreme Court held that the ADA did not preempt a breach of contract action by participants in a frequent flyer program complaining of retroactive changes in the conditions of the program, but did preempt an action for violations of state consumer protection laws based on the same allegations. The issue, as identified by the Court, was whether private actions constituted a state enactment or enforcement of any law prohibited by the preemption provision.[192] The Court found that a suit for breach of contract did not involve the same potential for intrusive state regulation as did a state consumer protection statute.[193] One reason the Court gave for its reluctance to construe the ADA to preempt simple contract claims was the lack of any vehicle for resolving such disputes other than state court lawsuits. In dismantling the federal regulation of airlines, the Court observed that Congress "indicated no intention to establish, simultaneously, a new administrative process for [the Department of Transportation] adjudication of private contract disputes."[194] As in *Morales*, the Court hinted that other claims might not be preempted.[195] In a footnote, the *Wolens* court noted that: (1) the FAA required "an air carrier to have insurance in an amount prescribed by the [Department of Transportation], to cover claims for personal injuries and property losses resulting from the operation or maintenance of an aircraft;" and (2) American Airlines did not urge that the ADA preempt personal injury claims relating to airline operations.[196] To the contrary, counsel for American acknowledged that safety claims, for example, a negligence claim arising out of a plane crash, would generally not be preempted. The Department of Transportation expressed a similar view, stating in a brief that it is unlikely that the ADA procedurally preempts the personal injury claims relating to airline operations.[197]

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[190] *Id.* at 390 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 (1983) (alteration in original)).

[191] 513 U.S. 219 (1995).

[192] *See id.* at 222.

[193] *See id.* at 228-29.

[194] *Id.* at 232.

[195] *See id.* at 234.

[196] *Id.* at 231 n.7 (internal citation omitted).

[197] *See id.*

With these precedents in mind, the *Kiefer*[198] court dealt with the question of whether a personal injury negligence action was related to an airline's prices or services within the meaning of the ADA. Based on the *Morales* court's definition of "related to," the *Kiefer* court found that "[s]uch a negligence action is not related to airline rates and services quite as directly as the contract claims in *Wolens*, but the impact of tort liability on an airline's rates and services is no less real."[199] The court noted "that tort liability cannot but have, in *Morales*' words, 'a significant impact upon the fares [airlines] charge,' just as the advertising guidelines in [*Morales*]."[200]

The court then turned to whether personal injury negligence actions constitute enforcement of state law within the meaning of the ADA. In answering this question, the court looked again to *Wolens*: "*Wolens* draws a fundamental distinction between 'what the [s]tate dictates and what the airline itself undertakes.' The former is pre-empted by the ADA; the latter is not. The critical determination in applying this distinction is not *whether* the [s]tate dictates, but what it dictates."[201] The court illustrated that while suits on private contracts involve some enforcement of state law, in the law of contracts, the duty to exercise ordinary care is imposed by law, not voluntarily assumed. "Enforcement of the duty through a common-law negligence action does not merely give effect to 'privately ordered obligations' as a breach of contract suit does."[202] The court concluded:

> With certain reservations, we think negligence law is not so policy-laden in imposing liability for personal injuries that suits for damages like those before us are preempted by the ADA. . . . Common-law negligence actions to recover damages for personal injuries do not impinge in any significant way on Congress' concern. Such actions did not impair federal regulation before the ADA, and we do not see how they impair deregulation since.[203]

Thus, the *Kiefer* court held that the ADA did not preempt the plaintiffs' state law negligence claims.

The plaintiff in *Bullard v. Lehigh-Northampton Airport Authority*[204] was an employee of Northwest Airlines. After the plaintiff

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198 Continental Airlines, Inc. v. Kiefer, 920 S.W.2d 274 (Tex. 1996).

199 *Id.* at 281.

200 *Id.* (quoting *Morales*, 504 U.S. at 390).

201 *Id.* at 281-82 (quoting *Wolens*, 513 U.S. at 233).

202 *Id.* at 282 (quoting *Wolens*, 513 U.S. at 228).

203 *Id.*

204 668 A.2d 223 (Pa. Commw. Ct. 1995).

slipped on a patch of ice on the tarmac between two aircraft gates and fractured her leg, she brought a negligence claim against the defendant. Plaintiff maintained that the airport had piled ice and snow in a mound which melted and subsequently froze into a patch of ice on which the plaintiff ultimately slipped. The trial court held that the defendant was immune because of the Political Subdivision Tort Claims Act,[205] which immunized political subdivisions against litigation arising out of the work that a political subdivision does.

On appeal, the plaintiff maintained that her claim was within the sidewalk exception to the Act. However, the court held that an airport tarmac is not a sidewalk within the meaning of the exception.[206] Plaintiff then argued that her claim fell within the real estate section of the Act. The court held that this was not so and followed the Pennsylvania Supreme Court, which previously held that these exceptions were to be narrowly construed and that there must be an actual defect in the land itself.[207] The court stated that because the "dangerous condition was on, rather than off the tarmac," summary judgment for the defendant was appropriate.[208]

The litigation in *Trinidad v. American Airlines, Inc.*[209] arose out of turbulence allegedly encountered on an American Airlines flight from New York to San Juan, Puerto Rico. According to the plaintiffs, the plane encountered turbulence and dropped a thousand feet in a very short time, resulting in personal injuries to the plaintiffs who were passengers on the flight. The court had to determine which law governed the standard of care that American owed to its passengers. The plaintiffs contended that state common law governing tort actions should apply. The defendant maintained that such actions were preempted by the ADA or, in the alternative, implicitly preempted by the Federal Aviation Act of 1958.

The court had to determine whether all of the plaintiffs' claims were expressly preempted by the ADA. The court found that although the ADA preemption clause preempted many state law causes of action, there was little guidance as to whether

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205 42 PA. CONS. STAT. §§ 8541-42 (1982).

206 *See Bullard*, 668 A.2d at 225.

207 *See id.* at 225-27 (citing Kiley by Kiley v. City of Philadelphia, 645 A.2d 184, 187 (Pa. 1994)).

208 *Id.* at 227.

209 932 F. Supp. 521 (S.D.N.Y. 1996).

a state law negligence claim is preempted by the ADA.[210] For guidance, the court looked to *Morales v. Trans World Airlines, Inc.*,[211] in which the Supreme Court stated that state laws relating to rates, routes, or services were preempted, but left the term "services" undefined.[212] The *Trinidad* court looked to various federal court of appeals and other district court decisions to arrive at its conclusion that "plaintiffs' claims do not involve ticketing, boarding, in-flight service and the like," but were safety-related and thus "not expressly preempted by the ADA."[213] The court then turned to the question of whether the plaintiffs' causes of action were implicitly preempted by the ADA. The court stated that it must decide "whether the statute's structure or purpose 'indicate[s] an intent to occupy an entire field of regulation.'"[214] The court concluded that after an examination of the legislative history of the ADA preemption clause, no such congressional intent to occupy the regulatory field was intended.[215]

The court lastly determined whether the plaintiffs' causes of action were implicitly preempted by the 1958 Federal Aviation Act. The defendants maintained that the Act, out of which came numerous federal aviation regulations, implicitly preempted state common law litigation of the same.[216] The court was not persuaded.[217] The court also found little case history to support the defendant's propositions. In the cases where the Act was held to have preemptive force, the preemptive matter was municipal regulations or ordinances which directly addressed the flight operations of airlines.[218] The court held that those cases were clearly distinguishable from the case at bar and deemed that the plaintiffs' cases were governed by the New York state common law of negligence.[219]

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210 *See id.* at 524.

211 504 U.S. 374 (1992).

212 *See id.* at 383-85.

213 *Trinidad*, 932 F. Supp. at 526 (citation omitted).

214 *Id.* (citing Levy v. American Airlines, No. 90 CIV. 7005 (LJF), 1993 WL 205857, at *7 (S.D.N.Y. June 9, 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994) (citation omitted)).

215 *See id.*

216 *See id.* at 527.

217 *See id.*

218 *See id.*

219 *See id.* at 527-28.

The plaintiff in *Stark v. Port Authority of New York & New Jersey*[220] was an employee of Pan Am World Airlines who was injured when she fell on a deteriorated sidewalk at John F. Kennedy International Airport. She appealed a lower court decision granting summary judgment to the defendant.

The court found that Pan Am had leased the area where the plaintiff fell.[221] The court noted that "[i]t is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair or maintain the premises."[222] The court found that the defendant was not obligated to repair the sidewalk and had no control over the premises.[223] Thus, the court held that summary judgment was appropriate.[224]

The case of *Gardner v. U.S. Air Inc.*[225] arose when a firefighter injured his knee while participating in a rescue operation after the crash of a U.S. Air flight at LaGuardia Airport in New York. The court stated that his claim was barred by the Fireman's Rule, New York General Municipal Law section 205-A, which provides that a firefighter cannot recover damages from accidents arising out of fighting fires because of the inherent risks in such a job.[226]

Plaintiff argued that New York General Business Law section 245(1),[227] relating to reckless operation of aircraft, provided an exception to the Fireman's Rule. The court stated that section 245(1) did not trigger an exception to the Fireman's Rule because it was not concerned with fire hazards or safety.[228] The court reasoned that the violation of such law would not create more hazards for a firefighter than he already normally faced.[229] Thus, the court ruled in favor of the defendant.[230]

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220 639 N.Y.S.2d 57 (N.Y. App. Div. 1996).

221 *See id.* at 58.

222 *Id.* (quoting Dalzell v. McDonalds Corp., 632 N.Y.S.2d 635 (2d Dept. 1995)).

223 *See id.*

224 *See id.*

225 634 N.Y.S.2d 499 (N.Y. App. Div. 1995).

226 *See id.* at 499-500.

227 N.Y. GEN. BUS. LAW § 245(1) (McKinney 1988).

228 *See Gardner*, 634 N.Y.S.2d at 499.

229 *See id.* at 500.

230 *See id.* at 499.

D. General Aviation Revitalization Act of 1994

The litigation in *Altseimer v. Bell Helicopter Textron, Inc.*[231] arose out of a helicopter accident. The plaintiffs filed an action for personal injuries, property damage, and economic losses arising out of the accident against Bell Helicopter Textron (Bell), which manufactured the helicopter. In their complaint, the plaintiffs alleged that Bell designed a defective helicopter and forty-two degree gear box (an integral component part of the helicopter). The complaint further alleged that Bell failed to provide proper warnings with respect to the design of the helicopter and gear box.

Bell moved for summary judgment on the grounds that the General Aviation Revitalization Act of 1994 (GARA)[232] prohibited a lawsuit against it because the aircraft was more than eighteen years old, and the helicopter had been rebuilt twice before, terminating any liability of Bell as the original manufacturer. In reaching its decision, the court first analyzed GARA. GARA is a statute of repose which limits the liability of aircraft manufacturers arising out of accidents in which the aircraft or component part is more than eighteen years old.[233] The court found that Bell had provided evidence that the helicopter and gear box were more than eighteen years old at the time of the crash.[234] "Therefore, GARA effectively preempts plaintiffs' action."[235] The court acknowledged that the result was "harsh," but stated it was consistent with the purpose of GARA, which was to protect general aviation manufacturers from litigation arising out of aircraft and parts that are remotely removed from those manufacturer's control.[236] The court thus granted summary judgment for Bell.[237]

The decedent in *Rickert v. Mitsubishi Heavy Industries, Ltd.*[238] died while trying to land an aircraft manufactured by Mitsubishi at the Casper, Wyoming Airport. The decedent's estate alleged that the plane, a Mitsubishi MU-2B-35-J, was defectively and neg-

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231 919 F. Supp. 340 (E.D. Cal. 1996).

232 49 U.S.C. § 40101 (1994) (time limit on civil actions against aircraft manufacturing).

233 *See Altseimer*, 919 F. Supp. at 342.

234 *See id.*

235 *Id.* at 342.

236 *See id.*

237 *See id.* at 343.

238 923 F. Supp. 1453 (D. Wyo. 1996), *rev'd on reh'g*, 929 F. Supp. 380 (D. Wyo. 1996).

ligently designed and based their claims on negligence and strict liability. Mitsubishi moved for summary judgment based on GARA.

The court found that GARA applied because Mitsubishi sold the aircraft twenty-one years ago.[239] However, the plaintiff alleged that an exception to GARA's protective liability provisions applied, namely the "knowing misrepresentation" exception.[240] This exception applies when the plaintiff can show that the defendant placed the product in the stream of commerce knowing that it was defectively manufactured.[241] The court, however, found that the plaintiff's evidence attempting to show this misrepresentation and fraud consisted of "innuendo and inference" and stated that GARA required specificity, which the plaintiff was unable to show.[242] Thus, the court granted Mitsubishi summary judgment.

The court in the unreported opinion of *Cartman v. Textron Lycoming Reciprocating Engine Division*[243] stated that the defendant, an aircraft component part manufacturer, was entitled to summary judgment because the plaintiff's evidence failed to satisfy GARA's "knowing misrepresentation or concealment" exception.[244] The court held that the plaintiff could not utilize this exception merely because the defendant did not notify the FAA about safety concerns regarding a part.[245]

E. Products Liability

The decedent in *Green v. Cessna Aircraft Co.*[246] crashed while trying to land his Cessna Seaplane on Togus Pond near Augusta, Maine. His estate brought a products liability action against Cessna, alleging that a cable which controlled the airplane's flaps broke and caused the plane to crash. Cessna moved for summary judgment claiming that there was no evidence showing that the failure of the cable caused the crash. Cessna instead presented experts who opined that the cable broke during the crash, not before.

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239 *See id.* at 1456.

240 *See id.*

241 *See id.*

242 *See id.* at 1462.

243 No. 94-CV-72582-DT, 1996 WL 316575 (E.D. Mich. Feb. 27, 1996).

244 *Id.* at *3.

245 *See id.*

246 673 A.2d 216 (Me. 1996).

The court stated that "there simply are no facts in evidence that this plane crash resulted from a failed . . . cable."[247] The court found that because there was ample evidence to support the inference that the crash was caused by pilot error, summary judgment was appropriate.[248]

F. Government Contractor Defense To Products Liability Actions

The plaintiff in *Strickland v. Royal Lubricant, Inc.*[249] was an aircraft mechanic who was working underneath a Chinook helicopter when hydraulic fluid sprayed into his face. The defendant moved for summary judgment asserting the government contractor defense. This defense shields contractors from liability under state law for design defects in products made and delivered to the United States Government if the contractor is found to be following government specifications.

The court denied the summary judgment motion because it found that genuine issues of material fact existed as to whether military specifications were reasonably precise with regard to the toxicity of the hydraulic fluid.[250] Because the record was silent on this issue, genuine issues of fact were found to exist.[251] The court said "[t]he specifications here . . . provide considerable discretion to the contractor in formulating the components of the product."[252] Thus, the court found that there was no "manufacturer's dilemma" about rigid specifications to follow and denied the defendant's summary judgment motion.[253]

The decedent in *Tate v. Boeing Helicopters*[254] died when the Army helicopter in which he was flying crashed. The decedent's estate brought a products liability action against the manufacturer of the helicopter alleging design defect and failure to warn regarding the helicopter's tandem hook system. The defendant moved for summary judgment based on the government contractor defense.

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247 *Id.* at 218.

248 *See id.* at 220; *see also Altseimer*, 919 F. Supp. at 341-42 (discussing GARA).

249 911 F. Supp. 1460 (M.D. Ala. 1995).

250 *See id.* at 1468.

251 *See id.*

252 *Id.*

253 *See id.*

254 921 F. Supp. 1562 (W.D. Ky. 1996).

The court followed the test set out by the Supreme Court in *Boyle v. United Technologies Corp.*,[255] which states that a defendant can avoid liability when a cause of action is brought under a state law that imposes liability for a failure to warn in using military equipment if: (1) the United States exercised discretion and approved the warnings; (2) the contractor provided conforming warnings; and (3) the contractor warned the United States of the dangers that the contractor, but not the United States, knew about.[256]

The district court found that the Army had exercised discretion over the development of the warnings and then approved them by reviewing the helicopter manuals.[257] Also, the Army had the final input with respect to what the manual contained.[258] Next, the court found that Boeing had provided conforming warnings because they were providing manuals, which had been approved by the Army, to the end users.[259] Finally, the court found that Boeing had made the Army aware of all the dangers of which Boeing itself was aware.[260] Thus, the defendant was entitled to summary judgment under the government contractor defense.[261]

The controversy in *In re Air Disaster at Ramstein Air Base, Germany*[262] arose when a C-5A Air Force aircraft crashed on takeoff from an Air Force base in Germany. The survivors of those killed in the crash filed suit alleging claims of negligence and products liability. The defendants, the manufacturers of the plane, claimed the government contractor immunity defense to the negligence action.[263]

The court of appeals followed the reasoning of the United States Supreme Court in *Boyle v. United Technologies Corp.*[264] for determining liability for design defects in military equipment. The Supreme Court held that such liability

> cannot be imposed, pursuant to state law when (1) [the] United States approved reasonably precise specifications; (2) the equip-

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255 487 U.S. 500 (1988).
256 *See id.* at 512.
257 *See Tate*, 921 F. Supp. at 1566-67.
258 *See id.* at 1567.
259 *See id.* at 1568.
260 *See id.*
261 *See id.*
262 81 F.3d 570 (5th Cir. 1996).
263 *See id.* at 573.
264 487 U.S. 500 (1988).

> ment conformed to the specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[265]

The court of appeals found that the first part of *Boyle* was satisfied because the Air Force had approved reasonably precise specifications and because they reviewed, evaluated, and tested the C-5A.[266] The court stated that such involvement "clearly implicates the [g]overnment's discretionary function and approval of reasonably precise specifications."[267]

The court then moved to the second part of the test and found that the plane had conformed to the Air Force's specifications.[268] The plaintiff challenged this conformity and claimed that the plane was not in conformity because it was not "failsafe."[269] However, the court dismissed this and described the specification of "failsafe" as a "vagary" and thus not relevant.[270]

The court then turned to the last part of the *Boyle* test and sought to determine whether an adequate warning of the dangers was given to the Air Force by the manufacturer. The court found that an Air Force engineer had been involved in the development and implementation of the aircraft part that ultimately failed.[271] Thus, "the Air Force was aware of any safety implications created by the design of the electrical circuit."[272]

The court then turned to the products liability claim and found that any defect was an "open and obvious" danger.[273] The court stated that because the danger was a physical fact and because the Air Force was deeply involved in the development of the plane, it should have known of any dangers that existed.[274] The court thus held for the plaintiffs.

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265 *Id.* at 512.
266 *In re Air Disaster at Ramstein*, 81 F.3d at 575.
267 *Id.*
268 *See id.*
269 *Id.*
270 *Id.*
271 *See id.*
272 *Id.* at 576.
273 *Id.* at 577.
274 *See id.*

G. STATUTE OF LIMITATIONS

The litigation in *Vaughn v. Northwest Airlines, Inc.*[275] arose when the plaintiff alleged that a Northwest agent incorrectly informed her that she could only check two items of baggage without paying an additional penalty. Because the plaintiff was unable to pay the penalty fee, she had to lift, carry, and stow her luggage onto the plane. While doing so, the plaintiff allegedly suffered an injury diagnosed as a "frozen shoulder."

The plaintiff brought her claims under the Air Carriers Access Act[276] and the Rehabilitation Act.[277] Neither statute provided for a statute of limitations for bringing such claims. A lower court dismissed both of her claims on the ground that they were time-barred because of a one-year statute of limitation, which the court borrowed from the Minnesota Human Rights Act.[278] The plaintiff argued that the Minnesota six-year statute of limitations should apply instead of the one-year statute of limitations. Ultimately, the Minneapolis appellate court concluded that the six-year statute of limitations applied because of the need for uniformity and consistency with the application of Federal Civil Rights provisions.[279]

III. WARSAW CONVENTION

A. RECOVERABLE DAMAGES

The chief issue in *Zicherman v. Korean Airlines Co.*[280] was whether a plaintiff may recover damages for loss of society resulting from the death of his relative in a plane crash in a suit brought under the Warsaw Convention.

Korean Airlines Flight 007 was shot down over the Sea of Japan on September 1, 1983, by military aircraft of the Soviet Union. Nearly 300 people were killed, including the brother and son of the plaintiffs in this action. Plaintiffs filed suit against Korean Airlines, seeking, among other things, damages for loss of the decedents' society and companionship and for the decedents' conscious pain and suffering.

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[275] 546 N.W.2d 43 (Minn. Ct. App. 1996), *aff'd in part, rev'd in part*, 558 N.W.2d 736 (Minn. 1997).

[276] 49 U.S.C. § 41705 (1994).

[277] 29 U.S.C. § 794 (1994).

[278] *See Vaughn*, 546 N.W.2d at 46.

[279] *See id.* at 50.

[280] 116 S. Ct. 629 (1996).

In a consolidated proceeding for common issues of liability and for the many claims against Korean Airlines, a trial court jury found that the destruction of the airplane was proximately caused by the willful misconduct of the aircraft's flight crew, thus lifting the Warsaw Convention's $75,000 cap on damages.[281] At the damages trial, Korean Airlines maintained that the Death on the High Seas Act (DOHSA) was the correct vehicle for determining the proper claimants and the recoverable damages and that damages for loss of society were not proper. The district court denied Korean Airlines' motion on that point and held that the plaintiffs could recover for loss of love, affection, and companionship. The Court of Appeals for the Second Circuit, however, set aside this award and, in applying general maritime law, held that the plaintiffs were entitled to recover loss of society damages, provided that they were dependents of the decedent at the time of death. The plaintiffs then petitioned the Supreme Court for certiorari, maintaining that under general maritime law, dependency is not a requirement for recovering loss of society damages.

Justice Antonin Scalia, writing for the Supreme Court, asked initially whether loss of society of a relative is recoverable under the Warsaw Convention. Complicating the analysis of such a question is the fact that the Warsaw Convention was written in French, and the translation of it has proved troublesome for courts in the United States. The principal problem is determining the meaning of *dommage*. After examining the wide array of possibilities that could be ascribed to the word, Justice Scalia interpreted "*dommage*" as meaning "legally cognizable harm," but noted that the article in which the word appears leaves it to the determination of the adjudicating courts in respective countries to specify just what harm is cognizable.[282]

After determining that the United States was the sovereign whose domestic law applied, Justice Scalia dismissed the Second Circuit's attempt to have maritime law govern all causes of action that arise under the Warsaw Convention, and instead decided that because of the nature of the case, Justice Scalia applied DOHSA.[283] DOHSA provided that recovery "shall be a fair and just compensation for the pecuniary loss sustained by

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[281] *See id.* at 631.

[282] *See id.* at 633.

[283] *See id.* at 636-37.

the persons for whose benefit the suit is brought."[284] Since DOHSA permitted recovery for pecuniary damages only, the plaintiffs could not recover loss of society damages.

Hollie v. Korean Airlines Co.[285] was a pre-*Zicherman* case similarly arising out of the downing of Korean Airlines Flight 007. Like the other cases in this section, the main issue in *Hollie* revolved around the damages awardable to the plaintiffs. Specifically, the primary question was whether damages for pain and suffering, loss of support, loss of nurture and guidance, grief of survivors, and loss of society could be recovered by the decedent's relatives.

Contrary to the later cases of *Zicherman* and *Bickel*, the court in *Hollie* declined to apply DOHSA. Instead, the Second Circuit looked to a much broader scope of federal maritime law to answer the questions presented.[286] The court awarded loss of support damages to the decedent's brother because it found that the evidence presented at trial supported the proposition that the decedent had supported the brother for a good part of his life and would have continued to do so for the remainder of her working life.[287] A similar result may have been found had DOHSA been applied in this case, because this was a pecuniary damages claim allowable under DOHSA.

The court did not award damages for loss of nurture and guidance to the decedent's nieces and nephews because, although she had a significant influence on the children's lives, she was not in the parental role, and as such, did not fill the position required for a recovery of nurture and guidance damages. The decedent's survivors were not allowed to recover damages for grief because federal maritime law did not permit such damages.[288] The loss of society damages issue was remanded back to the district court for a further finding of fact of whether the decedent's survivors fell into the class of dependents who can recover for such damages.

Bickel v. Korean Airlines Co.[289] also involved the downing of Korean Airlines Flight 007. After the degree of liability attributable to Korean Airlines was established as willful misconduct, the litigation turned to the issue of damages. Recovery for injuries and

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284 46 U.S.C. § 762 (1975).
285 60 F.3d 90 (2d Cir. 1995), *vacated*, 116 S. Ct. 808 (1996).
286 *See id.* at 92.
287 *See id.* at 93.
288 *See id.* at 95.
289 83 F.3d 127 (6th Cir. 1996), *modified by*, 96 F.3d 151 (6th Cir. 1996).

deaths arising on international commercial flights is limited by the Warsaw Convention to $75,000.[290] However, that limitation is waived if the air carrier is found to have engaged in willful misconduct.[291] The plaintiffs in this case were survivors of five of the people killed during the crash. The damages issue centered around whether the plaintiffs' non-dependent relatives were beneficiaries and, as such, entitled to recover pecuniary as well as non-pecuniary damages.

The *Bickel* court followed the recent Supreme Court case of *Zicherman v. Korean Airlines Co.*, which held that the domestic law of a party country to the Warsaw Convention determined who can bring an action and what damages they can recover.[292] To do this, the Sixth Circuit applied a federal choice of law rule.[293] The court considered a number of factors in deciding which forum should govern the outcome of this case. The factors that the court found most significant were: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states; (4) the relative interests of those states in the determination of the particular issue; (5) the protection of justified expectations; (6) the basic policies underlying the particular field of law; (7) certainty; (8) predictability; (9) uniformity of results; and (10) ease in the determination and application of the law to be applied.[294] Using these factors, the court decided that the law of the United States should govern the case.[295]

Bickel also involved claims for loss of society, and survivors' grief damages. The Sixth Circuit Court of Appeals followed the analysis of the Supreme Court in *Zicherman*, which stated that DOHSA was the internal law of the United States that governed these types of cases. DOHSA permitted only pecuniary damages, and the *Zicherman* Court determined that loss of society damages were not pecuniary and could not be recovered under the act.[296] Although the *Zicherman* Court did not directly address the issues of survivors' grief damages and pain and suffering damages, the *Bickel* court determined that the DOHSA limitation on non-pecuniary damages also applied to these types

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290 *See id.* at 129.

291 *See id.*

292 *See* 116 S. Ct. at 634.

293 *See Bickel*, 83 F.3d at 130.

294 *See id.* at 131.

295 *See id.*

296 *See Zicherman*, 116 S. Ct. at 637.

of damages. Consequently, the Sixth Circuit held that the plaintiffs could not recover these damages either.[297]

Forman v. Korean Airlines Co.[298] was another post-*Zicherman* case in which the plaintiffs sought damages for the decedent's pre-death pain and suffering, loss of financial contributions, household services, grief, anguish, and loss of society. Because of the Supreme Court's recent *Zicherman* decision, the *Forman* court did not allow loss of society or mental grief damages.[299] The question arose, however, as to whether pre-death pain and suffering damages were pecuniary damages, the sort of damages seen by the Court in *Zicherman* to be compensable. The *Forman* court stated that "[t]he key factual dispute turns on whether the passengers were immediately rendered unconscious."[300] The court relied on expert testimony and decided that the evidence "permits the inference that [the plaintiff] survived the missile impact, remained conscious despite the airplane's decompression, and experienced decompression-related pain."[301] The court thus allowed pre-death pain and suffering damages.

The court found the loss of financial contributions damages issue difficult because the plaintiff had only recently received her green card, and, thus, any previous earnings were of limited value as to predicting her future earnings for the determination of such an award.[302] The court decided that, "[s]ince [the plaintiff's] pre-green card work history could be legitimately disregarded in predicting her future earnings, we think that [the plaintiff's] expert's reliance on data concerning the average woman of [the plaintiff's] age and education was permissible."[303]

B. Limited Liability

The case of *Saba v. Compagnie Nationale Air France*[304] involved rain damage to carpets after transport by Air France from Austria to Virginia. The plaintiff, a carpet dealer, arranged to have 575 carpets flown from Salzburg, Austria, to John F. Kennedy International Airport in New York City on an Air France aircraft. The carpets were transported by truck from New York City to

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297 *See Bickel*, 83 F.3d at 132.
298 84 F.3d 446 (D.C. Cir. 1996).
299 *See id.* at 448.
300 *Id.* at 449.
301 *Id.*
302 *See id.* at 450.
303 *Id.*
304 78 F.3d 664 (D.C. Cir. 1996).

Dulles Airport. The truck delivery was done by Dynair, Air France's cargo agent. At Dulles, Dynair's warehouse facility was full, so in accordance with their usual practices, its employees stored the carpets outside, and covered them with heavy gauge plastic. Five days after the carpets arrived, one-third of an inch of rain fell at Dulles Airport. The precipitation damaged eighty-six carpets as a result of water seeping through the plastic. The plaintiff then sued Air France for the damage.

An air carrier's liability for damage of cargo is limited by the Warsaw Convention to a sum of 250 francs per kilogram.[305] However, such a limitation is inapplicable when the carrier is proved to have engaged in willful misconduct.[306] The plaintiff maintained that Air France and Dynair's conduct amounted to willful misconduct.

The lower court found that Air France had inadequately packed the carpets in a manner inconsistent with its stated procedures.[307] It also highlighted the fact that Dynair had left the carpets outside once it started to rain.[308] Based on these factors, the lower court found that Air France could not use the Warsaw Convention's limited liability rules because their actions and those of their agent, Dynair, amounted to willful misconduct.[309] Air France appealed, arguing that the lower court applied the standard for misconduct when in fact it should have used the standard for willful misconduct.

The D.C. Circuit Court of Appeals stated, "From our earliest cases under the Warsaw Convention, we have treated reckless disregard as equivalent to willful misconduct."[310] Although the court could not find any clear definition of how previous courts had defined reckless disregard, it did point out that, "we have never held that negligence—gross or otherwise—would suffice to make out willful misconduct."[311] The court concluded that if the plaintiff was to show willful misconduct on the part of Air France, he "must prove that the defendant was subjectively aware of the consequences of his act—not necessarily that it would cause the exact injury, but at least that it was certainly

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305 49 U.S.C. § 1502 (1988).

306 *See Saba*, 78 F.3d at 666.

307 *See id.*

308 *See id.*

309 *See id.* at 667.

310 *Id.*

311 *Id.*

likely to cause an injury to the plaintiff."[312] In applying this standard to the facts of the case, the Court of Appeals found that: "There was no evidence presented in this case that could meet the test of willful misconduct or its equivalent, reckless disregard. . . . [Although the carpets had been packed inadequately, the plaintiff could not show] that the packers knew that the cargo was likely to be left outside in inclement weather."[313] Additionally, no evidence was shown that the Dynair employees could anticipate rain or that they would have thought that the packaging over the carpets was inadequate.[314]

The plaintiffs in *Siben v. American Airlines Inc.*[315] were honeymooners traveling from New York City to Anguilla. During the flight, American lost one of the two bags they had checked at the airport in New York City. Although American found and returned the bag on the last day of their honeymoon, the plaintiffs had their vacation disrupted and discovered that a forty-year-old shawl of sentimental value was missing from the bag. The plaintiffs alleged four causes of action that the defendant attempted to have preempted by the limited liability provisions of the Warsaw Convention or, in the alternative, to be dismissed for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The court first addressed whether the Warsaw Convention applied to this cause of action. The plaintiffs argued that two exceptions to the Warsaw Convention regarding liability applied that negated the air carrier's liability protections. First, willful misconduct on the part of the air carrier foreclosed a carrier from enjoying the limited liability status. The court accepted this first exception.[316] The court also accepted the plaintiffs' second exception—that American improperly filled out a baggage check which should have contained three vital elements (ticket number, notice of the Warsaw Convention's applicability, and the number and weight of items).[317] Thus, the provisions of the Warsaw Convention did not preempt the plaintiffs' litigation.

The court then moved to the plaintiffs' four causes of action and reviewed them to determine whether to grant American's

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[312] *Id.* at 668.
[313] *Id.* at 670.
[314] *See id.*
[315] 913 F. Supp. 271 (S.D.N.Y. 1996).
[316] *See id.* at 277.
[317] *See id.*

motion to dismiss.[318] Plaintiffs' first claim was fraud. American claimed the plaintiffs failed to satisfy the falsity and intent requirements for fraud under New York law. The court stated, however, "Plaintiffs' allegations that American told them repeatedly that the suitcase had been found coupled with the knowledge that it had not been, are sufficient to state a claim for fraud."[319] Thus, this claim survived the defendant's motion to dismiss.

The court then addressed the plaintiffs' claim for negligent misrepresentation. The plaintiffs alleged: (1) that American employees falsely told them that the luggage had been found; (2) that they relied on that information; and (3) that this reliance was done to their detriment.[320] The court held that these allegations satisfied the elements of negligent misrepresentation under New York law so these claims survived the defendant's motion to dismiss.[321]

The court, however, dismissed the plaintiffs' claims for negligent infliction of emotional distress and intentional infliction of emotional distress.[322] The former failed because the plaintiffs failed to allege conduct which allegedly endangered the plaintiffs' physical safety.[323] The latter failed because the conduct in question was not so outrageous nor extreme in character as to go beyond the bounds of decency.[324]

The plaintiffs in *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on Sept. 5, 1986*,[325] were survivors of a hijacking. At the conclusion of a jury trial consolidating eighteen separate actions filed against Pan Am, the jury found that Pan Am's conduct in connection with the Alert Security Program (ASP) constituted willful misconduct.[326] The ASP was a security measure taken by Pan Am in response to threats against American air carrier international flights. Pan Am advertised the ASP as providing increased security for its flights through enhanced security measures. The jury, however, found that Pan Am's willful misconduct was not the

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318 *See id.* at 278.
319 *Id.*
320 *See id.* at 279.
321 *See id.*
322 *See id.*
323 *See id.*
324 *See id.* at 280.
325 920 F. Supp. 408 (S.D.N.Y. 1996).
326 *See id.* at 411.

proximate cause of the damages claimed.[327] After the trial, the plaintiffs moved for a transfer of the remaining claims to the Southern District of California on the ground that their reliance on Pan Am's misrepresentations about ASP constituted claims that were not common to those already tried. Pan Am claimed that any remaining claims were preempted by the Warsaw Convention and by the Airline Deregulation Act (ADA).[328]

The court first addressed Pan Am's contention that the jury erred when it found that Pan Am's behavior did not constitute willful misconduct. Pan Am claimed that because of this, the court should not even address the issue of its liability.[329] The court rejected Pan Am's claim, pointing to "[a]mple evidence . . . elicited at trial which rationally supports the jury's conclusion that Pan Am made [fraudulent] misrepresentations of enhanced security measures in connection with [the ASP]."[330] However, the court then stated that it "must reject plaintiffs' contention that since they allege actual reliance on defendants' misrepresentations, they need not prove that those misrepresentations were the proximate cause of plaintiffs' injuries."[331] The jury found that even if all the representations made about the ASP had been true, the hijacking would still have occurred.[332] Thus, the defendant's misrepresentation was not the proximate cause of plaintiffs' injury.[333]

The court went on to state that even if the plaintiffs had claims that were not preempted by the Warsaw Convention, those claims were preempted by the ADA.[334] This preemption occurred because "survival of [a] claim would be incompatible with Congress' manifest intent to preempt all state law claims pertaining to airline fares and services."[335] The court concluded, "because the claims here are not 'tenuous, remote or peripheral to' airline services, . . . but rather at their core, they are preempted by the ADA."[336]

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327 *See id.*

328 *See id.*

329 *See id.* at 412.

330 *Id.*

331 *Id.* at 413.

332 *See id.* at 411.

333 *See id.* at 413.

334 *See id.* at 414.

335 *Id.* at 415.

336 *Id.* (citation omitted).

The plaintiff in *Ajibola v. Sabena Belgium Airline*[337] attempted to ship Nigerian baseball caps from Nigeria to the United States on Sabena to celebrate the participation of the 1994 Nigerian World Cup soccer team. The plaintiff had arranged for the baseball caps to be shipped to Houston, Texas, by way of New York City's JFK International Airport. However, the caps entered the United States in Boston and were later routed through New York. There was some dispute as to what happened to the caps at this point, but the caps never arrived in Houston and were later destroyed by U.S. Customs because of violations of U.S. Customs regulations concerning trademark and copyright laws. The plaintiff then filed suit in Bronx County Civil Court claiming that Sabena failed to deliver the merchandise on time and falsely collected repackaging money from them. The plaintiff moved for summary judgment on the basis that Sabena had violated Articles 9 and 25 of the Warsaw Convention Agreement. Sabena made a cross-motion to invoke the Warsaw Convention's limited liability provisions.

The plaintiff relied on Article 9 of the Warsaw Convention, which prevents a carrier from relying on the limited liability provisions if the airway bill does not set out all of the necessary particulars.[338] The plaintiff maintained that Sabena's failure to list Boston on the airway bill as a stopping place was a violation of Article 9.[339] Sabena claimed that it should not be responsible for an Article 9 violation because a carrier may add an unscheduled, unlisted stopover point in the case of necessity.[340] However, the court could find no evidence that it was routed out of necessity.[341] The court granted the plaintiff's motion for summary judgment under Article 9 and denied the defendant's motion for summary judgment.[342]

The defendant in *Bell v. Swiss Air Transport Co., Ltd.*[343] appealed a judgment after a non-jury trial awarding the plaintiff $12,500, plus interest and disbursements. The plaintiff filed suit after the loss of his laptop computer following a pre-boarding security check for an international flight. The New York Supreme Court found that the plaintiff's proof was "insufficient

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337 No. 95 Civ. 2479 (CSH), 1996 WL 271859 (S.D.N.Y. May 21, 1996).

338 *See* 49 U.S.C. § 1502 (1988).

339 *See Ajibola*, 95 Civ. 2479 (CSH), 1996 WL 271859, at *2.

340 *See id.* at *3.

341 *See id.*

342 *See id.* at *4.

343 25 Av. L. Rep. (CCH) ¶ 17,259 (N.Y. Sup. Ct. 1996).

to support a finding that the loss resulted from [Swiss Air's] wilful misconduct or equivalent conduct within the meaning of . . . the Warsaw Convention."[344] The court stated that under the Warsaw Convention's restrictive standard of liability, the plaintiff was required to prove that Swiss Air had intentionally mishandled his laptop computer with knowledge or reckless disregard of the probable consequences of its mishandling.[345] The court thus reduced the award from $12,500 to $200, the amount prescribed by Article 22(2) of the Warsaw Convention.[346] The plaintiff argued that because the Zurich State Police and not Swiss Air had required the plaintiff to check the laptop computer as checked baggage, the Warsaw Convention's limitation should not apply. The court disregarded this argument.[347]

C. Accident vs. Willful Misconduct

The litigation in *Tseng v. El Al Israel Airlines, Ltd.*[348] arose when the plaintiff was searched prior to an El Al flight from New York to Tel Aviv. Plaintiff claimed that during the search, several items were stolen from her baggage.[349] She also claimed that because of the search to which she was subjected, she suffered from headaches, upset stomach, ringing in her ears, nervousness and sleeplessness.[350]

The court first determined that the Warsaw Convention applied and that the plaintiff's claimed injury was an "accident" within the meaning of Article 17 of the Warsaw Convention.[351] The United States Supreme Court, in *Air France v. Saks*,[352] stated that the definition of "accident" in Article 17 was that which is an "unexpected or unusual event or happening that is external to the passenger" and that it should be applied flexibly.[353] The federal district court held that what happened was an accident and not willful misconduct on the part of El Al, as the plaintiff claimed.[354]

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344 *Id.*
345 *See id.*
346 *See id.* ¶ 17,259-60.
347 *See id.* ¶ 17,260.
348 919 F. Supp. 155 (S.D.N.Y. 1996).
349 *See id.* at 157.
350 *See id.*
351 *See id.* at 158.
352 470 U.S. 392 (1985).
353 *Id.* at 405.
354 *See Tseng*, 919 F. Supp. at 158.

The court then looked to the Supreme Court's decision in *Eastern Airlines, Inc. v. Floyd*,[355] in which the Supreme Court disallowed any recovery for psychosomatic injuries unaccompanied by bodily injury.[356] The *Tseng* court found that the plaintiff sustained no bodily injury because she was not injured by the person who was searching her.[357] The court stated, "On the contrary, all of her personal injuries are attributable to her shock and outrage at the way she was treated."[358] The court dismissed the plaintiff's claims for personal injuries, but awarded her $1,034.90 for her lost baggage.[359]

D. Jurisdiction

The court in *Aviateca, S.A. v. Friedman*[360] issued a writ of prohibition that prevented a state court trial judge from hearing a wrongful death action brought against Aviateca arising from the crash of one of its aircraft. The court looked to Article 28(1) of the Warsaw Convention which states that actions for damages arising out of international air travel must be brought in one of four places:

(1) The domicile of the carrier;
(2) the principal place of business of the carrier;
(3) the carrier's place of business through which the contract of carriage was made; or
(4) the place of destination.[361]

Since the United States was not one of those four places, the trial court judge did not have subject matter jurisdiction over the claims.[362]

IV. FAA REGULATIONS

A. Non-Renewal/Suspension of Pilot's Certificate

The case of *Fried v. Hinson*[363] involved the Federal Aviation Administration's (FAA) non-renewal of the plaintiff's designated pilot examiner's certificate. Claiming that this non-renewal was unjust, the plaintiff filed suit on administrative and

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355 499 U.S. 530 (1991).
356 *See id.* at 552.
357 *See Tseng*, 919 F. Supp. at 158.
358 *Id.*
359 *See id.* at 160.
360 678 So.2d 387 (Fla. Dist. Ct. App. 1996).
361 *See id.* at 388.
362 *See id.*
363 78 F.3d 688 (D.C. Cir. 1996).

constitutional grounds alleging violations of the Administrative Procedure Act (APA) and the due process clause of the Constitution.

The FAA issues designated pilot certificates for one year terms, with renewal being necessary each year. Plaintiff's designated pilot examiner's certificate had been renewed annually for approximately thirty years until the local FAA office chose not to renew his certificate. The plaintiff protested to the regional FAA office about the non-renewal and then to the National Flight Standards Service Director, all of whom affirmed the non-renewal. Thereafter, he filed suit alleging that the procedure by which the certificate was denied renewal was violated the APA and due process clause because he was not given adequate notice of his impending non-renewal and that he was not given an opportunity to respond to the non-renewal decision.

Plaintiff's first contention was that the FAA violated the procedure that its own rules prescribe.[364] The court felt that the plaintiff did not demonstrate "that the modified procedure adapted by the FAA in this case resulted in substantial—or any—prejudice [to the plaintiff]."[365] The court stated, "An agency is entitled to 'a measure of discretion in administering its own procedural rules in such a manner as it deems necessary.'"[366]

Plaintiff's second contention was that the FAA violated the plaintiff's constitutional right to procedural due process.[367] The court pointed out that the due process clause does not apply unless the aggrieved individual can show that the government action at issue deprives him of a natural interest in life, liberty, or property.[368] The plaintiff's contention was that he had a property and a liberty interest that were infringed upon by the FAA when it did not renew his designated pilot examiner's certificate.[369] Addressing the property interest issue first, the court stated that the plaintiff "had no cognizable property interest in the renewal of his [designated pilot examiner's certificate] authority because he had no legal entitlement to renewal. FAA regulations allow the agency to determine whether to renew a

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364 *See id.* at 690.

365 *Id.*

366 *Id.* at 691 (citation omitted).

367 *See id.*

368 *See id.*

369 *See id.* at 692.

particular examiner each year."[370] Because nothing in the record showed that a pilot examiner had a guaranteed right to have his certificate renewed, the court held that the plaintiff did not have a property interest in that renewal.[371]

The court similarly found no merit in the plaintiff's liberty interest argument.[372] It stated that "the entitlement [the plaintiff] seeks to preserve involves only performing a function of the agency as its delegate; non-renewal leaves intact his basic liberty to sell flight instruction services to willing private buyers."[373] The court stressed that it was not deciding whether it would review an FAA decision of whether to renew a pilot examiner certificate, but rather was merely limiting itself to the more narrow issue of whether the procedures involved in this case were fair and reasonable.[374]

In *Gilbert v. NTSB*,[375] the FAA temporarily suspended the plaintiff's pilot's license for safety violations. The plaintiff filed suit, alleging that the NTSB acted arbitrarily and capriciously in its handling of the matter in that the procedures used by the FAA and the NTSB in suspending his license deprived him of due process.

The controversy began when the FAA mailed the plaintiff a notice that it intended to suspend his pilot's license for ninety days because of safety regulation violations. Plaintiff requested an informal conference, at which the parties did not resolve the matter. The FAA administrator then issued an order suspending his license for ninety days. Plaintiff appealed that order to the NTSB, which affirmed the FAA's decision. Plaintiff then filed a timely notice of appeal to the full Administrative Law Judge Board at the NTSB. At this time, he obtained an extension of time in which to file his appellate brief to the Board. Because of a computer mishap, plaintiff's counsel was unable to file the brief by the deadline and, instead, mailed it three days later. In doing so, he did not attempt to obtain an additional extension and did not mention the late filing. Because of this, the FAA moved for dismissal on the ground that the brief was not timely filed. The NTSB granted this motion, stating that while the plaintiff may have demonstrated good cause for not filing the

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370 *Id.* (citation omitted).
371 *See id.*
372 *See id.*
373 *Id.*
374 *See id.*
375 80 F.3d 364 (9th Cir. 1996).

brief on time, he did not demonstrate good cause for failing to request an additional extension before the filing deadline.

The court first looked to see whether it had jurisdiction to review the plaintiff's constitutional claims.[376] An administrative agency lacks authority to review challenges to the constitutionality of statutes or regulations promulgated by such agency.[377] Because of this, a petitioner need not exhaust the challenges before seeking judicial review.[378] "Thus, in conjunction with a properly appealed adjudicative order from the NTSB, [the court could] consider constitutional claims regardless of whether the petitioner presented the claims to the NTSB."[379] In this case, the plaintiff challenged the constitutionality of FAA and NTSB procedures.[380] These "agencies [were] without the power or jurisdiction to adjudicate these constitutional claims."[381] The court pointed out, however, that

> [a] petitioner . . . may not obtain judicial review simply by invoking the term "due process." . . . [D]ue process "is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal." . . . In the present appeal, [the plaintiff's] claims do not allege mere procedural errors. [Plaintiff] challenges the due process afforded him by the FAA prior to imposition of the suspension of his pilot's license. He also challenges, on due process grounds, the NTSB's authority to adopt a strict procedural rule for the dismissal of his appeal for what he characterizes as a minor procedural, nonprejudicial defect.[382]

For these reasons, the court determined that it had jurisdiction.[383]

Next, the court turned to whether the notice given to the plaintiff was sufficient. The court looked to precedent that stated that the procedure used by the FAA in issuing a petitioner a written notice utilizing the informal conference did not deprive a petitioner of due process.[384] Plaintiff's case was weakened further because he had a full evidentiary hearing before an Administrative Law Judge and an opportunity to appeal that

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376 *See id.* at 366.
377 *See id.* at 366-67.
378 *See id.* at 367.
379 *Id.*
380 *See id.*
381 *Id.*
382 *Id.* (citation omitted).
383 *See id.*
384 *See id.*

decision to the full board.[385] Thus, the court determined that the plaintiff's first due process claim lacked merit.[386]

Plaintiff's second due process claim was that due process rights "preclude[d] the NTSB from adopting and enforcing a strict procedural rule [that would] permit it to dismiss an appeal for failure to file a timely brief, when no prejudice from a late filing would result."[387] In dismissing this claim, the court stated, "The NTSB is free to adopt and enforce a strict procedural rule, so long as it applies the rule uniformly or with reasoned distinctions."[388] Because the plaintiff presented no evidence that the NTSB did not apply this policy consistently, the court held that this due process claim also failed.[389]

Plaintiff's last argument was that "the NTSB acted arbitrarily and capriciously by applying its strict rule to dismiss his appeal because he did not file a timely appellate brief or request an additional extension before expiration of the filing deadline."[390] In determining whether the NTSB's actions were arbitrary or capricious, the court must evaluate whether the NTSB "articulate[d] a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.' . . . The NTSB's decision must be based on the relevant factors and may not constitute a clear error of judgment."[391] The record revealed that the NTSB determined that "good cause did not exist for [the plaintiff's] failure to request an extension before the expiration of the filing deadline."[392] After the plaintiff's lawyer discovered the problem with his computer, he could have filed an extension or done something else to notify the NTSB of the problem. However, all he did was file the brief late without disclosing the late filing, and even then, did not request an extension of time to file it. Under these particular circumstances, the court decided that the NTSB did not act arbitrarily or capriciously in determining that the plaintiff had failed to establish good cause by failing to request an additional extension of time before the filing deadline.[393]

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385 *See id.*

386 *See id.*

387 *Id.*

388 *Id.*

389 *See id.* at 368.

390 *Id.*

391 *Id.* (citations omitted).

392 *Id.*

393 *See id.*

The plaintiff in *Thomas v. Hinson*[394] attempted to have an FAA suspension of his pilot's license reversed. The plaintiff and an employee of his company were flying a plane to St. Louis when the incident, out of which the litigation arose, occurred. According to his statement to the FAA, plaintiff's employee was the pilot monitoring the flight controls and the plaintiff was the non-flying pilot. Plaintiff communicated with air traffic control, called check lists, and set flaps. As they approached their destination, plaintiff's employee stated that he was lowering the landing gear and moved the gear handle down. The plaintiff saw that the handle had been pushed down, but did not make sure that the gear down light on the cockpit panel was illuminated. In fact, the landing gear had not gone down. When the plane got a few feet from the runway, the plaintiff noticed that the light was not on and directed his employee to go around. In the process, the airplane's propellers scraped the runway. The plane later landed safely.

After this incident, the FAA suspended both of their pilot's certificates "for violating 14 C.F.R. section 91.13(a), which states, 'No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.'"[395] Plaintiff contended that this section was unconstitutionally vague and ambiguous as it applied to him.[396] His main argument was that there were no duties or responsibilities for acts or omissions of a second pilot on a single pilot aircraft, such as the one he was flying, and, thus, he had no notice of a duty to verify that his employee had lowered the landing gear and that his failure to do so would violate the FAA regulation.[397]

The court stated that "[a] regulation is unconstitutionally vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited."[398] The court felt that in this case, the regulation in question was clear enough that the plaintiff should have known what was and what was not prohibited.[399] Furthermore, the court stated that section 91.13(a) "does not limit its reach to a pilot-in-command or a pilot who manipulates the flight controls," and said, "the regula-

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394 74 F.3d 888 (8th Cir. 1996).
395 *Id.* at 889.
396 *See id.*
397 *See id.*
398 *Id.*
399 *See id.*

tion applies to any person who operates an aircraft."[400] The plaintiff did not challenge the assertion that he was actively involved in the aircraft's operation. Thus, the court denied the plaintiff's petition to review the decision because he was actively involved in the aircraft's operation and had a clear duty under section 91.13(a) not to operate the airplane in a way that endangered the life or property of another.[401]

The plaintiff in *Foster v. Skinner*[402] had his pilot's license revoked by the FAA in 1986 because of safety violations. This revocation was later reduced to a suspension. In 1989, the FAA again revoked the plaintiff's pilot license when he landed his helicopter in a school yard. Again, this revocation was reduced to a suspension. The plaintiff then brought an action for damages under the Fifth Amendment alleging thirteen claims of relief, all relating to the FAA's and the NTSB's authority to revoke pilot certificates and the administrative procedures that they used to do so. Defendant then moved to dismiss based on the following three theories.

First, the defendants maintained that the lower court lacked jurisdiction to hear the case.[403] The court of appeals agreed, stating that challenges to review FAA procedures have their exclusive jurisdiction in the court of appeals.[404] Thus, the district court properly dismissed two of the claims but not the other eleven.

Second, defendants maintained that the plaintiffs failed to state a claim for which relief could be granted.[405] The court looked to its previous decision of *Go Leasing, Inc. v. NTSB*,[406] in which the court held that the FAA has authority to select and impose sanctions on certificate holders.[407] Thus, for plaintiff's claims numbered one through eight and ten through eleven, the court found dismissal to be proper.[408] For the plaintiff's ninth claim regarding the FAA's administrative authority to delegate, the court found that it was not supported by case law or the regulations and dismissed it as well.[409]

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400 *Id.*
401 *See id.* at 890.
402 70 F.3d 1084 (9th Cir. 1995) (per curiam).
403 *See id.* at 1087.
404 *See id.* at 1088.
405 *See id.*
406 800 F.2d 1514 (9th Cir. 1986).
407 *See Foster*, 70 F.3d at 1088-89.
408 *See id.*
409 *See id.* at 1089.

The litigation in *Wagner v. NTSB*[410] arose when the NTSB suspended Wagner's pilot certificate for ninety days. Wagner was a pilot for Desert Airlines, a company that flew Sun World International executives from place to place. On one of the flights, the regular Beechcraft King Air that Desert Airlines used had mechanical problems. Because Desert Airlines was interested in buying a Learjet, it agreed to take a Learjet on a demonstration flight to determine whether it wanted to buy the plane. The demonstration flight would double as a flight for Sun World International. The NTSB suspended the plaintiff's certificate, stating that he had flown a flight for which he was not qualified.

The court framed the issue as "whether a flight can be a 'demonstration flight' under Part 91 of the FAA regulations, when a person flying the airplane is considering the purchase, but the paying customer does not know that it is a demonstration flight on which it does not enjoy all the protections of Part 135."[411] The central fact in this case was that the Sun World executives knew nothing about the demonstration flight arrangements. The court stated, "As far as the prospective seller of the Learjet was concerned, this was a demonstration flight at no charge .... [b]ut as far as the [Sun World executives] knew, this was a commercial flight for which they would be billed."[412]

The court then analyzed the two FAA regulations in question.[413] Part 135 provides regulatory safeguards for air passengers.[414] Part 91 provides more liberal rules for such flights as carrier training flights or demonstration flights.[415] Wagner was certified to fly the plane under Part 91, but not under Part 135. The court stated, "We agree with the NTSB that the regulation must be applied based on what the customers knew when its executives boarded the plane, not upon arrangements unknown to it between the owner and prospective purchaser of the airplane."[416] The court concluded that "[u]nless all customers making travel arrangements on a flight know that they are dealing with a demonstration of an airplane for which no charge will

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410 86 F.3d 928 (9th Cir. 1996).

411 *Id.* at 929.

412 *Id.* at 930.

413 *See id.* at 931.

414 *See id.*

415 *See id.*

416 *Id.*

be made to some prospective purchaser of the aircraft, this Part 91 exception to Part 135 cannot apply."[417]

The plaintiff in *Beauchemin v. NTSB*[418] appealed an NTSB order affirming an FAA revocation of his private pilot certificate. In 1994, the FAA revoked the plaintiff's certificate because of his previous conviction of drug possession and distribution. The FAA concluded that the pilot lacked the qualifications to hold a pilot's certificate because his conviction showed that he lacked the degree of care, judgment and responsibility required of a certificate holder. The plaintiff appealed the revocation to the NTSB which affirmed the FAA's revocation order.

On appeal, the plaintiff maintained that revocation of his pilot's certificate was punitive and constituted a violation of the double jeopardy clause of the Fifth Amendment.[419] The court stated, "[T]he test of 'whether a civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.'"[420] The court looked to the case of *Pinney v. NTSB*,[421] in which the Tenth Circuit Court of Appeals stated, "[I]t is reasonable to conclude that a pilot who has violated a drug trafficking statute is also likely to violate regulations concerning air safety."[422] Thus, the civil penalty assessed against Beauchemin bears a reasonable relationship to the government's interest in promoting air safety.[423] The court thus affirmed the NTSB's order.

In *Richard v. Hinson*,[424] the plaintiff attempted to recover attorneys' fees and expenses after the FAA wrongfully revoked his airman's certificate. His justification for attempting to receive these attorneys' fees was the Equal Access to Justice Act (EAJA).[425] Under the EAJA, a citizen may recover his attorneys' fees and expenses if his net worth is under $2 million and the government agency is unable to show substantial justification for its position against that individual.[426] Plaintiff's application for

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417 *Id.*

418 No. 95-9534, 1996 WL 384562 at *1 (10th Cir. July 10, 1996).

419 *See id.*

420 *Id.* at *1 (quoting U.S. v. Halper, 490 U.S. 435, 440 (1989)).

421 993 F.2d 201 (10th Cir. 1993).

422 *Id.* at 203.

423 *Beauchemin*, 1996 WL 384562, at *2.

424 70 F.3d 415 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 2522 (1996).

425 5 U.S.C. § 504 (Supp. 1995).

426 *See id.* §§ 504(a)(1), (b)(1)(B).

fees and expenses was denied because his net worth exceeded $2 million.[427]

The court deemed this to be an equal protection case, determined the proper standard under which to review the qualification system, and then analyzed the purpose of the legislation to determine whether it satisfied that standard.[428] If a suspect classification or a fundamental right is impinged by the government in the case, then a court should apply the standard of strict scrutiny.[429] In this case, the EAJA provision classified according to wealth, which the court determined not to be a suspect classification.[430] Thus, the court applied the rational basis standard. "Under the rational basis test, disparate treatment of similarly situated groups is not unlawful if a rational purpose underlies the disparate treatment and Congress has not achieved that purpose in a patently arbitrary or irrational way."[431]

The court reviewed the historical and statutory notes for the EAJA, and found that the purpose of the EAJA was

> to eliminate[,] for the average person[,] the financial disincentive to challenge unreasonable government actions. . . . Rather than restricting access, the EAJA broadens access to courts. The net worth provision specifies the outer financial limits of the individuals who the legislature determined may forego challenging the government because of the expense involved. This purpose is legitimate.[432]

Thus, the court determined that the net worth provision of the EAJA did not violate the plaintiff's equal protection guarantees.[433]

B. Registration of Aircraft

The plaintiff in *Air One Helicopters, Inc. v. FAA*[434] purchased a helicopter from a Spanish company, Helisca Helicopters, and then attempted to register the helicopter with the FAA as required by FAA regulations. However, the FAA refused to do so claiming the helicopter was still registered in Spain. An aircraft can not be registered in two countries pursuant to the Chicago

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427 *See Richard*, 70 F.3d at 416.
428 *See id.* at 417.
429 *See id.*
430 *See id.*
431 *Id.*
432 *Id.* at 417-18 (citations omitted).
433 *See id.* at 418.
434 86 F.3d 880 (9th Cir. 1996).

Convention on International Civil Aviation. Air One attempted to get a release from the Direccion General De Aviacion Civil (DGAC), Spain's national aircraft registry, stating that the Spanish registration was no longer valid. The DGAC refused to do so because there was a lien on the aircraft. However, evidence showed that the corporation holding the lien no longer existed. Still the DGAC refused to issue the release and, subsequently, the FAA refused to register the helicopter because of the dual registration.

After the court determined that it had jurisdiction to hear the case because of the futility of further administrative appeals by the plaintiff to the FAA, the court held that "the FAA's decision to register the helicopter was contrary to law because the Spanish registration was no longer valid."[435] The court stated that, although Air One cannot prove the lien no longer exists, "the reason it can't is not because the lien is valid, but because the appropriate Spanish bureaucrat won't say the lien is no longer valid—even though everyone concerned knows that it is no longer valid."[436]

C. PENALTIES

United States v. Emerson[437] was an attempt by the FAA to recover a civil penalty for past violations by the defendants, an air taxi company and its owner, of federal aviation law and to permanently enjoin future violations. The violations consisted of thirty-seven separate violations, each of which was subject to a civil penalty.

The government justified its penalty request because it claimed that the defendant was a "seasoned violator who has repeatedly threatened public safety in the face of the FAA's enforcement activities."[438] The defendants requested leniency because of their attempts to mitigate the effects of their past wrongs and their limited ability to pay a large fine. The FAA requested a penalty of $8,500 for each of the thirty-seven violations. Some of the factors the court considered in deciding on the amount of the fine included the fact that the defendants had repeatedly violated FAA regulations; that they had repeat-

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435 *Id.* at 883.

436 *Id.*

437 927 F. Supp. 23 (D.N.H. 1996), *aff'd*, 107 F.3d 77 (1st Cir.), *petition for cert. filed*, 65 U.S.L.W. 3815 (May 27, 1997) (No. 96-1901).

438 *Id.* at 27.

edly been sanctioned for violations of federal aviation laws; that their mitigation had not "discounted the gravity of the stipulated violations;" that they had limited financial resources; and that the FAA has an interest in deterrence through monetary fines.[439] Taking these issues into account, the court reduced the fine from $8,500 per violation to $5,000 per violation, making the total penalty payable by the defendants $185,000.[440]

The litigation in *Cronin v. FAA*[441] arose when the Department of Transportation (DOT) and the FAA promulgated regulations for alcohol and drug testing for air carrier employees who perform safety sensitive functions. The regulations provided that if an employee tested positive, he was to be permanently barred from performing the same duties as before the drug test with *any* employer. The plaintiffs, a pilot and a pilots' union, challenged the FAA's authority to promulgate such regulations on due process grounds. The court found that although the pilot and the union had authority to bring the claim, the claim was not ripe for review because no employee had been subjected to the employment ban without being accorded adequate due process.[442] Thus, the court dismissed the case.[443]

V. CONTRACTS

A. Air Carrier Tickets

In *American Airlines, Inc. v. Austin*,[444] the United States demanded a refund of $2.5 million for airline tickets that the government purchased but never used between 1985 and 1989. The crux of the dispute centered around the time limit within which the purchaser of an airline ticket could claim a refund. The court found that governmental regulations "address refunds for unused tickets but do not explicitly limit the government's right to such refunds except that any recovery by offset must be made within ten years."[445] The tickets, which were identical to tickets sold to the general public, contained time limits within which passengers had to seek refunds for unused tickets.

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439 *Id.* at 28-29.

440 *See id.* at 29.

441 73 F.3d 1126 (D.C. Cir. 1996).

442 *See id.* at 1131-33.

443 *See id.* at 1134.

444 75 F.3d 1535 (D.C. Cir. 1996).

445 *Id.* at 1538.

The court framed the issue as, "whether the government is entitled to refunds for tickets that it did not use, in spite of provisions on the tickets, ticket inserts, and tariffs incorporated into the tickets by reference, limiting the time for seeking such recovery."[446] Central to the court's decision in this case was "that a provision in a government contract which violates or conflicts with a federal statute is invalid or void."[447]

The court set out to decide whether the refund time limits in the airline ticket agreements violated or conflicted with any statutory right of the government. If so, the limits could not bar the government from recovering refunds for unused airline tickets. The court construed the applicable statute using the standard tools of statutory construction.[448] In looking at the language of section 3726 of the Transportation Payment Act of 1972,[449] the statute in question, the court stated, "Congress intended for the government to recoup any advance payments made for transportation it does not receive. . . . Furthermore, it placed no time or other limitation on the government's recovery right."[450]

The court then looked at the legislative history of section 322 of the Transportation Payment Act of 1940,[451] which had been amended by the enactment of the Transportation Payment Act of 1972.[452] The court decided that Congress's purpose in enacting the Transportation Payment Act of 1972 was to "permit payment for the transportation of persons or property for or on behalf of the United States in advance of completion of the transportation services, 'subject to later recovery by deduction or otherwise of any payments made for any services not received as ordered.'"[453] At the time of this amendment, Congress did not impose any limitations on the government's right to recover advance payments for unused services.[454] The Supreme Court, in *Schweiker v. Hansen*,[455] restated that it is "the duty of all courts to observe the conditions defined by Congress for charging the

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446 *Id.*

447 *Id.*

448 *See id.*

449 31 U.S.C. § 3726 (1994).

450 *Id.* at 1539.

451 *See* Pub. L. No. 92-550, § 322(b), 86 Stat. 1163, 1164 (codified as amended, at 31 U.S.C. § 3726).

452 *See Austin*, 75 F.3d at 1538-41.

453 *Id.* at 1540 (citation omitted).

454 *See id.* at 1541.

455 450 U.S. 785 (1981).

public treasury."[456] One such condition, as the court of appeals saw it, was the ability of the government to recover payments for such things as airline tickets when they do not use the services.[457] "The airlines' ticket provisions limiting such recovery are plainly inconsistent with the rights Congress granted the government and are no bar to the government's right to refunds. This is especially true where, as here, federal transportation regulations implementing congressional policy, were part of the agreements with the airlines."[458] Therefore, the court held for the government.[459]

The plaintiffs in *Johnson v. American Airlines, Inc.*[460] filed class action breach of contract actions against American and United Airlines. In both actions, the plaintiffs alleged that the two airlines told them that if they canceled their previously purchased tickets, they would be assessed a penalty of twenty-five percent of the fare. However, when the plaintiffs canceled, they were penalized twenty-five percent of the total ticket price, which included a federal transportation tax. The lower courts in both actions granted the airlines summary judgment on the basis that the actions were preempted by section 1305 of the Airline Deregulation Act (ADA).[461] After numerous appeals, the plaintiffs then filed petitions for certiorari in the United States Supreme Court. The Supreme Court granted the plaintiffs' petitions, vacated the previous judgments against them, and remanded the case to the Illinois Appellate Court for further consideration in light of the Supreme Court's decision in *American Airlines, Inc. v. Wolens.*[462]

On remand, the Illinois Appellate Court observed that it had previously relied on *Morales v. Trans World Airlines, Inc.*,[463] in which the Supreme Court interpreted section 1305 of the ADA broadly and "found that . . . state regulation of allegedly deceptive airline fare advertisements related to rates and was therefore preempted by section 1305(a)(1)."[464] However, the United

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[456] *Id.* at 788 (quoting Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947)).

[457] *See Austin*, 75 F.3d at 1541.

[458] *Id.* at 1541-42.

[459] *See id.*

[460] 663 N.E.2d 54 (Ill. App. Ct. 1996).

[461] *See* 49 U.S.C. app. § 1305(c)(1) (1988) (revised without substantive change and recodified at 49 U.S.C. § 41713(b)(1) (1994)); *Johnson*, 663 N.E.2d at 55.

[462] 513 U.S. 219 (1995).

[463] 504 U.S. 374 (1992).

[464] *Johnson*, 663 N.E.2d at 56.

States Supreme Court in *Wolens* applied a new test for determining whether a claim is preempted. "The majority [in *Wolens*] found that whether the claim related to rates, routes and services was only one step in determining whether a claim is preempted . . . ."[465] The Illinois court reasoned that *Wolens* focused on the language in section 1305 that stated "no state shall enact or enforce any law" and held that in order for there to be preemption under section 1305, an action must involve an "enactment or enforcement" of state law.[466]

In light of *Wolens*, the Illinois Appellate Court determined that it must decide "whether this case involves an effort to hold the airlines to their self-imposed contract terms offered by them and accepted by the plaintiffs or whether it amounts to 'enactment or enforcement' of a state law."[467] The court stated that if the obligation undertaken by the airline was solely self-imposed, such a breach is not preempted.[468] However, if the source of the obligation is a state law or policy, such a breach of that obligation is preempted.[469]

The court analyzed the plaintiffs' claims against the airlines and agreed that the plaintiffs' "breach of contract claims do not involve the enforcement of a state law, but rather, an agreement between the airlines and plaintiffs. It is clear that the airlines individually made their rate determinations without any interference or involvement from the state."[470] Thus, the court concluded that the plaintiffs' breach of contract actions were not preempted.[471]

The controversy in *Chukwu v. Board of Directors British Airways*[472] arose when the plaintiff bought a ticket for his brother, a resident of Nigeria, to fly from Lagos, Nigeria, to Grand Cayman via New York and Miami on British Airways. His brother did not have a visa for such travel when he arrived at the gate in Lagos, and British Airways refused to board him. The plaintiff brought suit to recover contract damages for the denial of boarding.

British Airways moved for summary judgment on three grounds: (1) the plaintiff could not pursue his state law contract

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465 *Id.*
466 *Id.* (citation omitted).
467 *Id.* at 57.
468 *See id.*
469 *See id.*
470 *Id.*
471 *See id.*
472 915 F. Supp. 454 (D. Mass. 1996).

claims because they were preempted by section 1305 of the ADA; (2) even if the claims were not preempted, the plaintiff could not obtain relief because British Airways had already refunded the price of his ticket to him; and (3) the plaintiff was not the real party in interest.[473]

In addressing British Airways' first ground for summary judgment, the court looked to the United States Supreme Court case of *American Airlines, Inc. v. Wolens*.[474] The district court observed that *Wolens* "does not appear to limit the type of contracts exempted from the ADA based on whether they involve 'rates, routes or services.'"[475] The court then agreed with British Airways that "[the airline] undertook no 'privately ordered obligations' outside the terms of the British Airways Tariffs."[476] The court reasoned that because of the special status of tariffs and the need for uniform application of them, "it appears reasonable to conclude that *Wolens* did not intend to exclude them from application of the ADA preemption provisions."[477]

The court also held that even had there been a non-preempted contract, British Airways did not breach its contractual obligations, observing that tariffs may be binding on passengers even if they do not know about them.[478] Tariff number forty-five allowed British Airways to deny boarding to a passenger if it determined in good faith that the passenger's travel documents were legally insufficient. Because the plaintiff's brother did not have a visa when he boarded the plane in Lagos, the court held that British Airways was justified in denying him boarding.[479] Furthermore, tariff number twenty-five limited a passenger's recoverable damages to recovery of the refund value of the ticket and tariff number fifty-five stated that British Airways was not liable for any consequential or special damages.[480] Thus, the court granted British Airways summary judgment.[481]

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473 *See id.* at 455.

474 513 U.S. 219 (1995).

475 *Chukwu*, 915 F. Supp. at 456.

476 *Id.*

477 *Id.*

478 *See id.*

479 *See id.*

480 *See id.* at 457.

481 *See id.*

B. Airport Leases

The court in *Northwest Airlines, Inc. v. Metropolitan Washington Airports Authority*[482] attempted to analyze a series of lease agreements between Northwest Airlines, Trans World Airlines (TWA), and the Metropolitan Washington Airports Authority (MWAA) (an entity with jurisdiction over Washington National Airport). The chronology of the dispute began in 1977 when TWA and Northwest leased nine gates at the Unit Terminal at Washington National Airport. This lease was called the Unit Terminal Agreement (UTA). In 1986, MWAA entered into a lease with all airlines operating out of the airport titled the 1990 Airport Use Agreement and Premises Lease (AUSPL). A specific provision in the AUSPL continued the UTA Lease Agreement. In 1991, when Northwest contemplated developing Washington National into a mini-hub, it acquired TWA's gates, which were first leased in the UTA in 1977. The following year in 1992, Northwest had a change of heart regarding the mini-hub and sub-leased the gates it had acquired from TWA to three other airlines. In 1995, the UTA Lease Agreement expired and MWAA told Northwest that it would begin leasing the gates that Northwest was sub-leasing to those airlines that were currently using them. MWAA maintained that the UTA expired in 1995 and that it was free to lease the gates to anyone it chose. Northwest maintained that the UTA, as continued by the AUSPL, did not expire until that agreement did in 2014.[483] The court stated that Northwest had to show a provision in the AUSPL Lease Agreement that evidences its right to lease the gates beyond 1995.[484] Northwest was unable to show such an express provision. The court found that the UTA expired in 1995 and that MWAA had the right to lease the gates after that time.[485]

The litigation in *Paul Wholesale v. Department of Transportation and Public Facilities*[486] arose when Anchorage International Airport (AIA) awarded a duty-free concession contract to the second-highest bidder, the David Green Group. AIA chose not to award the contract to the highest bidder (the plaintiff) because the airport made the determination that the plaintiff did not have the requisite retail experience. The plaintiff appealed the

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482 924 F. Supp. 704 (E.D. Va. 1996).

483 *See id.* at 709.

484 *See id.*

485 *See id.*

486 908 P.2d 994 (Alaska 1995).

airport's decision. While the appeal was pending, the airport canceled its contract with the David Green Group. The plaintiff's appeal was then dismissed as moot. The David Green Group and Paul Wholesale both appealed.

The Alaska Supreme Court found that the AIA, as a subagency of the Alaskan government, had a reasonable basis to cancel the bidding process on three grounds: (1) because of an ambiguity in the bid specifications; (2) because of allegations of impropriety in the bidding process; and (3) to avoid the cost and delay of litigation.[487] Thus, there were rational bases for canceling the bidding process. As a result, the court found that the original bid was moot and dismissed the appeals.[488]

The plaintiff in *Wood County Airport Authority v. Crown Airways, Inc.*[489] was a lessor of hangar space at an airport. The defendants, an air taxi operation, wished to expand and needed more space to accommodate larger aircraft. The plaintiff and the defendant jointly decided to build a new hangar and signed a lease agreement providing for such construction in December 1992. Subsequently, in July 1993, the cost of building the hangar increased. In December 1993, Mesa Airlines bought the assets and liabilities of Crown Airways. Then, in February 1994, Mesa told the Airport Authority not to proceed with the construction of the hangar. Finally, in June 1995, the Airport Authority canceled the hangar project and brought suit, alleging intentional interference with contractual relations, breach of contract, breach of duty of good faith and fair dealing, and promissory estoppel. The defendant moved for summary judgment.

The court held that the plaintiff was unable to show that Crown had modified the lease because doing so would have required the use of parol evidence.[490] The court found that because Mesa was not a party to the contract when the breach occurred, Mesa could not have breached the contract.[491] The court awarded summary judgment for the defendants.[492]

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[487] *See id.* at 1004.
[488] *See id.*
[489] 919 F. Supp. 960 (S.D.W. Va. 1996).
[490] *See id.* at 966.
[491] *See id.* at 968.
[492] *See id.* at 969.

C. Essential Air Services

The litigation of *Mesa Air Group, Inc. v. Department of Transportation*[493] arose when two commuter carriers terminated service to two small towns following the Department of Transportation's reduction in subsidies to those carriers under the Essential Air Services Program (EAS).[494] The EAS program enabled carriers to serve small towns and cities, which would not otherwise have air service, by providing subsidies to those carriers to offset losses they would otherwise suffer.

The Department of Transportation entered into subsidy agreements with the two plaintiffs, Mesa Air Group and WestAir Commuter Airlines, to service communities in New Mexico, Arizona, Wyoming, Colorado, and Kansas. Following Congress's reduction in the 1996 EAS budget, the Department of Transportation instituted a program-wide reduction in subsidy payments and service levels. Three weeks after this reduction, Mesa informed the Department of Transportation that it would terminate its service to Silver City, New Mexico, Kingman, Arizona, Goodman, Kansas, and Lamar, Colorado. WestAir informed the Department of Transportation that it would terminate service to both Visalia and Merced, California. The Department ordered the air carriers to continue service for ninety days (the specified time period in the agreement for canceling routes) on the basis that this reduction in subsidy payments was not a termination of the EAS agreement and, thus, the carriers were not free to terminate service unilaterally.

The court first answered the question of whether the Department of Transportation's order reducing subsidy payments was a departmental regulation or a contract.[495] If it was the former, then the regulatory interpretation would be given substantial deference by the courts; if it was the latter, then it would be subject to interpretation under regular contract law principles.[496] The court looked to 49 U.S.C. section 41737(d)(1), which states that "[t]he Secretary may make agreements . . . to pay compensation under this subchapter. An agreement by the Secretary under this subsection is a contractual obligation of the Government to pay the Government's share of the compensa-

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493 87 F.3d 498 (D.C. Cir. 1996).

494 49 U.S.C. § 41731-41734 (1994).

495 *See Mesa Air Group*, 87 F.3d at 503.

496 *See id.*

tion."[497] The court, in interpreting this statute, stated that "[t]he terms of the statute indisputably establish Congress' intent to make the subsidy agreements contracts, not administrative regulations."[498] The court concluded that the Department of Transportation's orders were, in essence, new contracts formed between the agency and the air carriers.[499] Thus, the court found that the ninety day termination notice period of the previous agreement between the two parties was void and that the air carriers were permitted to terminate their air service.[500]

D. Aircraft Leases

United Air Lines, Inc. v. ALG, Inc.[501] evolved out of the lease of a Boeing 747 aircraft from United to ALG. The plaintiff, United, claimed that ALG failed to make payments for rent, maintenance reserves, and insurance premiums. Additionally, the plaintiff claimed that ALG did not return the aircraft as specified, requiring United to ferry the aircraft from England to the United States. The plaintiff filed suit and then moved for summary judgment on five of its counts, as well as on three of ALG's counterclaims.

ALG's counterclaims were that United failed to deal with the defendant in good faith, that United fraudulently induced the vice president of ALG to sign the contract, and that United failed to perform a necessary inspection of the aircraft before delivery.[502] The court dismissed ALG's counterclaims, stating "[b]ecause ALG does not explain how UAL's actions, if true, constituted an abuse of any discretion granted by the [l]ease to UAL, we hold that the defendant cannot proceed with its defenses and counterclaims based on the implied duty of good faith and fair dealing."[503] ALG relied on a phrase in the lease which stated that the aircraft that was to be delivered by United "was to 'have had permanently and properly repaired any damage to the Aircraft that exceeds the requirements of the most recent FAA-approved maintenance program for the Aircraft for operation without restrictions.'"[504] Although United pointed to

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497 *Id.* (alterations in original).
498 *Id.*
499 *See id.*
500 *See id.* at 506.
501 912 F. Supp. 353 (N.D. Ill. 1995).
502 *See id.* at 357-59.
503 *Id.* at 359.
504 *Id.*

another clause in the contract which provided for an "as-is where-is" condition of the plane, the court stated that "where ambiguities exist in a contract between two provisions, the more specific provision relating to the same subject matter controls over the more general provision."[505] Thus, the court applied the more specific provision to the "as-is where-is" clause and denied United's first motion for summary judgment.[506]

United argued that ALG waived any right it might have had to a claim for rescission because its delay in doing so was excessive.[507] The court dismissed this, stating first, "it is unclear from the record when ALG discovered facts which would alert it to a claim of rescission," and second, "it appears that at most ALG waited six months before seeking rescission, a significantly shorter time period than was at issue in other Illinois cases deeming the remedy waived."[508] The court thus denied United's second motion for summary judgment.[509]

United also moved for summary judgment on ALG's counterclaim for negligence. ALG sought damages for lost profits from the sublease and possible future relationships. The court granted summary judgment for United, stating that "[s]ince ALG claims to have lost only anticipated profits and future commercial opportunities, it cannot maintain a tort claim for negligence."[510]

United then moved for judgment on the pleadings on ALG's fourth counterclaim, which alleged that by getting a third-party air carrier to sign an adhesion maintenance contract, United intentionally interfered with ALG's business and contractual relationship with the third-party. The court found that ALG's allegations were sufficient to withstand a motion for judgment on the pleadings and, thus, denied United's motion.[511]

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505 *Id.* at 360 (citation omitted).
506 *See id.*
507 *See id.*
508 *Id.* (citation omitted).
509 *See id.*
510 *Id.*
511 *See id.*

VI. INSURANCE

A. POLICY INTERPRETATION

The issue in *Avemco Insurance Co. v. Pond*[512] was whether a commercial purpose exclusion in an insurance policy barred coverage for injuries arising out of an incident with a parachutist. Avemco issued an aircraft liability policy to Nathan and Lawrence Pond, providing bodily injury and property damage coverage for their Cessna airplane. The policy stated: "This [p]olicy does not cover bodily injury, property damage, or loss: (1) [w]hen your insured aircraft is . . . (b) used for a commercial purpose."[513]

Nathan Pond and his family occasionally performed in parachuting events under the name of "the Pond Family Skydivers." On July 24 and 25, 1993, the Pond Family Skydivers performed at an air show in Lebanon, New Hampshire. Of the monies received for their performance, $200 was used to reimburse Nathan Pond for the use of his airplane, with the balance to be distributed among the other family members who were skydivers. Unfortunately, on July 24, a nephew of the Pond brothers jumped from the airplane and collided with another plane, killing both him and the pilot of the other plane. The estates of the decedents brought claims against Nathan arising out of the two deaths. Avemco filed a declaratory judgment to determine its obligation to defend and indemnify Mr. Pond in the underlying action.

The policy's definition of commercial purpose included "other use[s] of the airplane for which an insured person gets money unless the money was reimbursable for a flight that is incidental to [the insured's] business or job, as allowed a private pilot by the [Federal Aviation Administration]."[514] The court determined that the $200 Nathan was to receive qualified as a reimbursement because the actual operating cost of the plane was greater than $200.[515] Thus, the court determined that the issue was whether the use of Mr. Pond's airplane to transport the Pond Family Skydivers to the jump site reasonably could be considered incidental to the skydiving business.[516]

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[512] 25 Av. L. Rep. (CCH) ¶ 17,274 (D.N.H. Apr. 11, 1996).

[513] *Id.* (alteration in original).

[514] *Id.* at ¶ 17,275 (alteration in original) (emphasis omitted).

[515] *See id.*

[516] *See id.*

The court decided that "the phrase 'incidental to [the insured's] business or job' could reasonably be understood to cover any use of an insured's airplane that plays a minor or subordinate role in comparison with the primary work for which the insured is receiving compensation."[517] The court determined that the present situation was such a case, and noted that the use of an airplane is incidental to commercial skydiving, because although the skydiver must have an airplane to perform, the skydiving itself was the primary activity for which the skydiver was being compensated.[518] For this reason, the court found that the exclusion did not bar coverage.[519]

The plaintiff in *American Eagle Insurance Co. v. Thompson*[520] was an insurance company that sought a determination that it had no duty to defend or indemnify the defendant, a pilot, in two state tort actions in Georgia. The insurance policy was issued to Arkansas Air, a fixed-base operator in Jonesboro, Arkansas. Defendant Thompson occasionally flew planes for Arkansas Air. He charged an hourly rate for his services and had no formal employment relationship with Arkansas Air. In April 1993, while flying a client of Arkansas Air from Jonesboro to Hilton Head, South Carolina, Thompson crashed in Georgia, killing Arkansas Air's client and the pilot of the other aircraft involved.

The insurance policy Arkansas Air had purchased from American Eagle provided that "bodily injury and property damage liability coverage protects you and any of your employees . . . ."[521] The defendant claimed that he was an employee of Arkansas Air at the time of the crash, whereas American Eagle claimed that he was not.[522] The trial court jury concluded that Thompson was an employee and that he should be covered by the insurance policy. American Eagle appealed the finding.[523]

The court reviewed the evidentiary record and found that there was sufficient evidence to support the jury's verdict that Thompson was an employee of Arkansas Air.[524] The key to this finding was that Arkansas Air employees had directed Thompson as to when the flight was to be flown, the departure and

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517 *Id.*

518 *See id.* at ¶ 17,275-17,276.

519 *See id.*

520 85 F.3d 327 (8th Cir. 1996).

521 *Id.* at 329.

522 *See id.*

523 *See id.*

524 *See id.* at 330.

arrival times of the flight, the particular aircraft to be flown, the destination, and the particular number of passengers.[525]

B. Effective Cancellation of Policy

The issue in *Escobedo v. Estate of Snider*[526] was what constituted an insurance company's effective cancellation of an aviation liability insurance policy. Decedent Snider, as part of a condition for maintaining his aircraft at an airport in California, was required to purchase liability insurance and furnish the county with a certificate of such insurance. He purchased a non-commercial aircraft policy from National Aviation Underwriters with $100,000 of bodily injury coverage. The language of the policy stated that it was effective from October 11, 1990, "until canceled." An additional endorsement attached to the insurance contract provided that "[w]e [(National)] agree to mail 30 days prior written notice to [the] addressee if we cancel this policy,"[527] with the addressee being the Venturi County Department of Airports.

On September 12, 1992, National mailed a premium notice to Snider warning that the policy would be canceled if his premium was not paid by October 12, 1992. On October 13, 1992, National mailed a second notice to the decedent, which stated, "[a]s noted on your premium due notice, your payment was due on 10-12-92. Since no payment was received, your policy was canceled as of that date."[528] Eighteen days later, on October 30, 1992, the decedent and his passenger, Escobedo, were killed when the Piper airplane crashed. Snider's estate then brought suit attempting to enforce the insurance contract.

The issue before the court was whether the first cancellation notice sent to the decedent was sufficient for National to deny coverage or whether a second, additional cancellation notice sent to the Venturi County Department of Airports was necessary. The court scrutinized the policy in the context of the Uniform Aircraft Financial Responsibility Act (UAFRA).[529] The court stated that "[i]n construing insurance contracts, doubts, uncertainties, and ambiguities arising out of the policy language are construed in favor of the insured to protect the insured's

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525 *See id.*

526 25 Av. L. Rep. (CCH) ¶ 17,185 (2d Cir. Feb. 20, 1996).

527 *Id.* (alterations in original).

528 *Id.*

529 Cal. Pub. Util. Code § 24230 (West 1994).

reasonable expectation of coverage."[530] The court looked specifically to section 24361 of the UAFRA, which stated that "[n]o insurance policy meeting the requirements of Section 24350 shall be canceled unless 30 days' prior notice is given to the department by either the insured or the insurance company."[531] The court determined that "[t]he purpose of UAFRA is to establish minimum standards for aircraft financial responsibility."[532] Following the UAFRA provisions, the court held that before National was able to cancel its decedent's policy, section 24361 of UAFRA required that a cancellation notice be mailed to the Department of Aeronautics in California, as well as to the decedent.[533] Thus, the court held that there had not been effective cancellation of the policy and found for the decedents' estates.[534]

VII. JURISDICTION

A. PROCEDURAL

The defendant in *United States v. Rezaq*[535] was being prosecuted for aircraft piracy when he raised several motions related to this prosecution. First, he maintained that the government unlawfully manufactured an element of their case. A provision in the aircraft piracy statute stated that the person must be "afterward found in the United States."[536] The defendant maintained that he was forcibly removed to the United States to stand trial, and, thus, this element of the offense was missing.[537] The court, however, stated that the statutory language did not impose a voluntary requirement on persons to stand trial and denied this motion.[538]

The defendant next moved to strike surplusage from his indictment. He sought to exclude language regarding murder and attempted murder as irrelevant to the Anti-Hijacking Act. The court found this issue to be moot, but even added that if it were not, the plaintiff would not be entitled to have the language struck based on the circuit's displeasure with this prac-

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530 *Escobedo*, 25 Av. L. Rep. (CCH) at ¶ 17,186 (citation omitted).
531 CAL. PUB. UTIL. CODE § 24361 (West 1994).
532 *Escobedo*, 25 Av. L. Rep. (CCH) at ¶ 17,186 (citations omitted).
533 *See id.*
534 *See id.*
535 908 F. Supp. 6 (D.C.C. 1995).
536 49 U.S.C. § 1472.
537 *See Rezaq*, 908 F. Supp. at 7.
538 *See id.* at 8.

tice.[539] The court found that the language merely described one of the elements.[540]

The defendant's last motion was to bifurcate the trial. He sought to separate the hijacking offenses from the murder and attempted murder offenses. He maintained that if the jury found him guilty of hijacking, then they should separately consider whether force or intimidation was used.[541] The court denied this motion, stating that the jury must be made aware of the full nature of the offenses charged.[542]

The plaintiffs in *Ackerman v. American Airlines, Inc.*[543] were former Braniff Airlines pilots who lost their jobs when that airline went bankrupt. When they lost their jobs, they attempted to find replacement jobs with other airlines, including American Airlines, Northwest Airlines, and Delta Air Lines. When these airlines did not hire them, they sued under the Employee Protection Program (EPP) of the Airline Deregulation Act.[544] The EPP was designed to provide job security for airline employees in the uncertain times following airline deregulation. Under the EPP, American was to give laid off pilots first hire rights, a provision that the plaintiffs maintained was violated when American refused to hire them.

The defendant maintained that collateral estoppel should bar this suit.[545] They pointed to the prior litigation in *Ackerman v. Northwest Airlines, Inc.*[546] and *Ackerman v. Delta Air Lines, Inc.*[547] as evidence that the plaintiffs' claims had already been litigated fairly and fully.

The court ruled that the prior litigation precluded the plaintiff from relitigating the issues.[548] The court held that the issue was identical, the issue had been litigated, and that the issue was a critical and necessary part of the previous judgments.[549] Thus, the plaintiffs' claims were barred by collateral estoppel.

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539 *See id.* at 8-9.

540 *See id.* at 9.

541 *See id.*

542 *See id.* at 10.

543 924 F. Supp. 749 (N.D. Tex. 1995).

544 49 U.S.C § 42101 (1994).

545 *See* Ackerman v. American Airlines, 924 F. Supp. at 752.

546 54 F.3d 1389 (8th Cir. 1995).

547 900 F. Supp. 467 (N.D. Ga. 1994).

548 *See* Ackerman v. American Airlines, 924 F. Supp. at 753.

549 *See id.*

The plaintiff in *Hillary v. Trans World Airlines, Inc.*[550] filed a negligence claim against TWA, alleging that an airline employee dropped a metal box on her head. TWA moved for summary judgment on the basis of *res judicata.* TWA maintained that a Louisiana federal court dismissed a previous action by the plaintiff against TWA because the statute of limitations had run.[551] After TWA moved for summary judgment, the plaintiff filed suit in Missouri, alleging the same cause of action. The court found "[t]hat final, valid judgment is now conclusive between the parties under Louisiana law," so the court concluded that *res judicata* barred the second suit.[552]

The plaintiff in *Charles E. Smith Management, Inc. v. Department of Taxation*[553] hangared its aircraft at Washington National Airport. The Virginia Department of Taxation assessed the plaintiff an aircraft use tax in the amount of $300,000, a $75,000 penalty, and $34,000 in interest. The plaintiff paid the tax and then appealed, alleging that Virginia was without the power to tax because the state had no power to license aircraft based at Washington National Airport since it is located in the federal enclave of the District of Columbia. Virginia responded that the power to license aircraft was within its police power.

The court decided the issue by considering the scope of the police power given to Virginia over Washington National Airport.[554] "[W]e think that the licensure of aircraft is clearly an exercise of the Commonwealth's police power."[555] Thus, the tax was upheld.

B. Federal Question Jurisdiction

The plaintiffs in *Roman v. Aviateca, S.A.*[556] were citizens of Nicaragua who were passengers aboard a Guatemalan aircraft that crashed in El Salvador in 1995. Plaintiffs claimed that the United States District Court in Texas was without subject matter jurisdiction to hear this case.[557] Defendant claimed that there was federal question jurisdiction based on questions of foreign

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550 930 F. Supp. 1332 (E.D. Mo. 1996).

551 *See id.* at 1334.

552 *Id.* at 1335.

553 467 S.E.2d 772 (Va. 1996).

554 *See id.* at 774.

555 *Id.*

556 25 Av. L. Rep. (CCH) ¶ 17,293 (S.D. Tex. May 22, 1996).

557 *See id.*

relations and the treaties of the United States.[558] Texas law permits a citizen of a foreign country to file suit in Texas if the foreign country has "equal treaty rights" with the United States.[559]

The court stated that "[d]etermination of whether [p]laintiffs have standing to proceed under § 71.031 requires consideration of treaties between the United States and the foreign country and, therefore, provides a basis for federal question jurisdiction."[560] The court thus granted the defendant's motion to dismiss for lack of standing.

VIII. EVIDENCE

The defendant in *Daniels v. Tew Mac Aero Services, Inc.*[561] was an aircraft service company that had overhauled the engine and carburetor of a Cessna 182K aircraft. The aircraft later crashed on a flight meant to "break in" the recently overhauled engine. The plaintiff, John Daniels, had piloted the break-in flight.

After the accident, the plane was inspected by the FAA. Before the trial, the trial court granted the plaintiff's motion in limine to exclude from evidence any part of the FAA accident report. Tew Mac, after losing at the trial court level, appealed claiming that the exclusion of the FAA action report prevented it from presenting its theory of the case. Tew Mac argued that the portion of the Federal Aviation Act[562] used as the basis for excluding the accident report must be construed narrowly.[563] Section 1441(e) provided that "[n]o part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."[564] Tew Mac claimed that a narrow interpretation of the statute was consistent with the National Transportation Safety Board's practice of generating two reports, a factual report and a probable cause

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558 *See id.*

559 TEX. CIV. PRAC. & REM. CODE § 71.031 (Vernon 1994).

560 *Roman*, 25 Av. L. Rep. at ¶ 17,293.

561 675 A.2d 984 (Me. 1996).

562 49 U.S.C. § 1441(e) (repealed 1994 by Pub. L. No. 103-272, 108 Stat. 757 (1994)).

563 *See Daniels*, 675 A.2d at 987.

564 *Id.*

report.[565] Tew Mac argued that the factual report should have been admitted.

The court analyzed the treatment of the NTSB factual reports in the federal courts and found the courts to be in disagreement.[566] However, the majority view supported the use of the factual reports, concluding that the purpose of the statutory bar is "to prevent usurpation of the jury's role as the factfinder, a purpose fully served by excluding from evidence the opinions or conclusions regarding the probable cause of accidents [the probable cause report]."[567] The court could find little support for excluding both the factual report and the probable cause report.[568] The court concluded that the legislative intent of section 1441 was "twofold: to keep the board from becoming embroiled in civil litigation and to prevent a usurpation of the factfinder's role. Permitting factual portions of the board's accident investigation does not defeat either of these purposes."[569] The court thus concluded that the trial court's exclusion of both reports was erroneous.[570] The court, however, was still left to decide whether the portions of the report were acceptable under the Maine Rules of Evidence.

The court examined the nature of the report as a public records and reports exception to the hearsay rule. The court stated that "[t]he safety board report is therefore a report of a public agency setting forth matters observed pursuant to a duty imposed by law as to which there is a duty to report."[571] The plaintiff argued that Maine Rule of Evidence 803(8)(B)(iv), which excludes factual findings from a special investigation of a particular complaint, case, or incident, applied.[572] The court, however, thought that this rule did not apply because the NTSB investigated all civil aircraft accidents, so it was not a special investigation.[573] Thus, the court held that the reports were acceptable under the Maine Rules of Evidence and vacated the lower court's judgment.[574]

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565 *See id.*
566 *See id.*
567 *Id.*
568 *See id.* at 988.
569 *Id.*
570 *See id.*
571 *Id.* at 989.
572 *See id.*
573 *See id.* at 990.
574 *See id.* at 990-91.

IX. CONSTITUTION

The Supreme Court, in *Gasperini v. Center for Humanities Inc.*,[575] decided whether a state statute requiring a review of jury verdicts for excessiveness could be recognized in federal court without violating the Seventh Amendment. The Seventh Amendment states that no fact tried by a jury shall be otherwise re-examined in any other court of the United States according to the rules of the common law.[576] The state statute in question was a New York law, New York Civil Practice Law and Rules 5501(c), which states that the appellate court is to review the size of jury verdicts and order a new trial when the award is excessive.[577] The Supreme Court stated that appellate review of such jury verdicts, when limited to issues of the abuse of discretion, is reconcilable with the Seventh Amendment for purposes of judicial economy.[578]

X. IMMIGRATION

The dispute in *Linea Area Nacional de Chile, S.A. v. Meissner*[579] arose when passengers traveling on a Linea Area Nacional de Chile (LAN) aircraft arrived at John F. Kennedy Airport in New York as a stopover on a flight to Seoul, South Korea, and requested political asylum. The issue was whether the Immigration and Naturalization Service (INS) or the airline was to assume physical and financial responsibility for the aliens pending determination of their asylum requests.

The INS relied on an agreement between the agency and the airline enabling LAN to bring into the United States undocumented aliens, allowing them to enter this country as part of a stopover on a longer flight.[580] The airline relied on amendments made in 1986 to the Immigration and Naturalization Act (INA), which repealed previous sections of the Act requiring airlines to assume physical and financial responsibility in cases such as this.[581]

The court stated that the principal question was whether Congress's intent in amending the INA in 1986 was to shift from the

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575 116 S. Ct. 2211 (1996).
576 *See* U.S. CONST. amend. VII.
577 *See* N.Y.C.P.L.R. § 5501(c) (McKinney 1995).
578 *See Gasperini*, 116 S. Ct. at 2223-24.
579 65 F.3d 1034 (2d Cir. 1995).
580 *See id.* at 1036.
581 *See id.* at 1037.

airlines to the INS the burdens incurred by safeguarding passengers seeking asylum.[582] After determining that the aliens in this case were the sort of aliens which fell within the scope of the INA amendment, the court stated that, "This statute makes clear that INS must expend funds on detention and deportation of excludable aliens."[583] The INS maintained that a section of the INA that was left unmodified by the 1986 amendments permitted it to continue to contract with carriers to make them responsible for the detention of aliens seeking asylum.[584] The court, however, stated that Congress did not modify that provision of the INA because the scope of that section was limited to the time during a routine layover as opposed to a situation where a passenger seeks asylum.[585]

The court then turned to whether the INS could rely on sovereign immunity to deny relief to the airline. The court dismissed this argument, stating, "[I]t is clear that Congress also intended that INS reimburse carriers for the expenses they incurred as a result of congressionally-repudiated INS policy."[586] The court, thus, held for LAN.

The case of *Aerolineas Argentinas v. United States*[587] was similar to *Linea Area Nacional de Chile v. Meissner*[588] in that it dealt with the question of who was to bear the expenses of asylum-seeking aliens arriving on foreign airlines. The facts were similar to the previous case in that the airline transported aliens to the United States with the intermediate point of New York City as a stopover from Argentina to Hong Kong. When the aliens requested asylum, the INS declined to assume custody, and instead ordered the airline to provide and care for the aliens until the completion of the asylum hearings. The cost to Aerolineas Argentinas for these services was $162,000.

The court in this case looked to the 1986 immigration user fee statute that changed the long-standing policy of forcing airlines to care for asylum-seeking aliens during the time of their asylum hearings.[589] The 1986 amendment provided that the INS would be responsible for detaining aliens pending asylum

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582 *See id.* at 1039.
583 *Id.* at 1040.
584 *See id.*
585 *See id.*
586 *Id.* at 1043.
587 77 F.3d 1564 (Fed. Cir. 1996).
588 65 F.3d 1034 (2d Cir. 1995).
589 *See Aerolineas Argentinas*, 77 F.3d at 1571.

procedures and that the cost of doing so would be funded by a surcharge on tickets for entering international passengers collected by the carrier at the port of embarkation.[590] The court stated, "The legislative intention to relieve the airlines of the custodial role for aliens awaiting asylum determination is clearly stated, and the statute's plain meaning directly implements that intention."[591] The court held that the Tucker Act was the jurisdictional vehicle for the airlines to use to recover the fees paid while caring for the aliens.[592]

XI. AIRLINE DEREGULATION ACT/PREEMPTION

A. GOVERNMENT ORDINANCES/REGULATIONS

The litigation in *Gustafson v. City of Lake Angelus*[593] arose when the plaintiff attempted to fly his seaplane on the town's lake. Lake Angelus ordinances prohibited the operation of such sea planes and ordered the plaintiff to stop flying. The plaintiff filed suit, claiming that the Federal Aviation Act preempted the town ordinances,[594] and that the enforcement of the ordinances was a violation of his equal protection and due process rights.

The court found that federal law did not preempt the city ordinances because "there is a distinction between the regulation of the navigable airspace and the regulation of ground space to be used for aircraft landing sites."[595] Although the plaintiff attempted to construe the Federal Aviation Act broadly, the court found that "[f]ederal preemption of the airspace under the [Federal Aviation Act] does not limit the right of the local governments to designate and regulate aircraft landing areas, including seaplane landing areas on lakes."[596]

The court next addressed the plaintiff's equal protection and due process claims. The court listed the town's safety-related reasons for prohibiting seaplane operations on the lake and then found that the ordinance was reasonable because there was

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590 *See* INA, 286 U.S.C. § 1356 (1994).

591 *Aerolineas Argentinas*, 77 F.3d at 1571.

592 *See* 28 U.S.C. § 1491 (1994 & Supp. 1997). *See also Air Transp. Ass'n of Am. v. Reno*, 80 F.3d 477, 485 (D.C. Cir. 1996) (carriers are not required by regulation, contract, or otherwise to pay the detention expenses in the absence of a statute imposing the duty).

593 76 F.3d 778 (6th Cir. 1996).

594 49 U.S.C. §§ 40101-41901 (1994).

595 *Gustafson*, 76 F.3d at 789.

596 *Id.* at 790.

no "basis on which to find that the . . . [ordinances are] arbitrary or unreasonable."[597]

The plaintiff in *Huntleigh Corp. v. Louisiana State Board of Private Security Examiners*[598] was a company that contracted with airlines to perform pre-departure screenings at airports. The Board of Private Security Examiners stated that the plaintiff violated the Louisiana Private Security Regulations and Licensing Law[599] and the board's rules regarding the registering and training of private security officers. Huntleigh appealed, asserting that the Airline Deregulation Act (ADA) prohibited states from enforcing state regulations with regard to security services because the ADA and the Federal Aviation Administration Authorization Act of 1994 (FAAAA) preempted the state regulations. The court agreed with the plaintiff stating that "[t]he Louisiana Private Security Regulatory and Licensing Law is a specific law which affects the 'services' of air carriers, and is within the reach of the preemptive provisions of the ADA and FAAAA."[600] The court continued, stating that "[t]o allow each state to prescribe the qualifications and training of employees of the airlines or of those with whom the airlines contract to perform such security screening would frustrate the uniformity of the training standards and employee qualifications, and thus conflict with the federal scheme."[601] The court concluded that it did not matter that the plaintiff was a security company rather than an air carrier because the company was an agent for the air carrier for which it performed services.[602]

The plaintiff in *Price v. Charter Township of Fenton*[603] owned a private airport in the town of Fenton. After a commercial operation began flying World War II vintage airplanes out of the airport, the town, in response to citizen complaints concerning noise, passed an ordinance limiting the frequency of flights from the airport. The plaintiff filed suit challenging the constitutionality of the ordinance, maintaining that federal aviation law preempted the ordinance. More specifically, the plaintiff as-

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597 *Id.* at 791.

598 906 F. Supp. 357 (M.D. La. 1995).

599 LA. REV. STAT. ANN. § 37:3270 (West 1988).

600 *Huntleigh*, 906 F. Supp. at 361.

601 *Id.*

602 *See id.* at 362.

603 909 F. Supp. 498 (E.D. Mich. 1995).

serted that the ordinance was preempted by the Federal Aviation Act of 1958.[604]

The court looked to the Supreme Court's decision in *City of Burbank v. Lockheed Air Terminal*,[605] where it held that a town ordinance prohibiting flights after 11:00 p.m. was preempted by federal law.[606] The Federal District Court found that if an ordinance regarding the timing of flights was preempted, an ordinance regarding the frequency of flights was also preempted.[607]

B. Products Liability

The United States Supreme Court, in *Medtronic v. Lohr*,[608] decided the question of whether federal law expressly preempted products liability claims against makers of medical devices. The court found that the process of pre-market approval of Class 3 medical devices was an additional requirement that is preempted by federal law. Such devices were exempted from the approval process because they are "substantially equivalent" to pre-existing devices and do not require approval until the Food and Drug Administration (FDA) initiates an approval process.[609]

The plaintiff in *Medtronic* suffered damages when a pacemaker malfunctioned. The product had been found by the FDA to be "substantially equivalent" and, thus, did not have to go through the pre-market approval process.[610] The plaintiff alleged products liability claims against the manufacturer for negligent design, negligent manufacturing, and failure to warn about the product's defects.[611] The court concluded that such state law negligence actions were not the sort of state law action that Congress intended federal law to preempt.[612] The court illustrated the problem as the state law damage remedy not being an additional requirement but as an additional incentive for manufacturers to comply with existing federal rules that regulate the manufacturers' products.[613]

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604 49 U.S.C. §§ 1301-1557 (1994).

605 411 U.S. 624 (1973).

606 *See id.* at 638.

607 *See Price*, 909 F. Supp. at 502.

608 116 S. Ct. 2240 (1996).

609 *See id.* at 2254.

610 *See id.*

611 *See id.* at 2248.

612 *See id.* at 2258.

613 *See id.* at 2255.

C. TORT/CONTRACT CLAIMS

The plaintiff in *Seals v. Delta Air Lines, Inc.*[614] filed suit alleging contract and negligence claims based on Delta's failure to provide ground transportation between gates at Dallas/Fort Worth International Airport. Delta raised three theories in its motion for summary judgment. First, Delta maintained that under Tennessee and Texas comparative negligence laws, no reasonable jury would find for the plaintiff. The court rejected this theory, declining to decide what a jury might do.[615] Second, Delta maintained that no contract existed between Delta and the plaintiff. The court also refused to accept this theory, stating that reasonable questions of fact existed as to whether a contract existed.[616] Third, Delta maintained that the Airline Deregulation Act (ADA) preempted the contract and negligence claims. In addressing this third theory, the court followed the recent case of *American Airlines v. Wolens*,[617] in which the Supreme Court held that the ADA did not preempt a breach of contract action brought under state law, stating that there is room for "court enforcement of contract terms set by the parties themselves."[618]

In analyzing the negligence claim, the federal district court in *Seals* noted that the courts had split on whether the ADA preempted such claims.[619] The court's analysis of dicta in *Wolens*, revealed that the Supreme Court did not hold that the ADA preempted personal injury suits.[620] The district court observed that "[e]ven Justice O'Connor, who espouses the broadest interpretation of the preemption clause, would allow such suits to continue on the theory that such safety concerns do not 'relate' to provisions of 'services' by carriers."[621] The *Seals* court also found guidance in Justice Stevens's opinion that Congress surely did not intend to either leave passengers without remedy for a personal injury action, or to turn the Department of Transportation into a forum for adjudicating personal claims.[622] Thus, the

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614 924 F. Supp. 854 (E.D. Tenn. 1996).

615 *See id.* at 857.

616 *See id.*

617 513 U.S. 219 (1995).

618 *Id.* at 222.

619 *See Seals* 924 F. Supp. at 854.

620 *See Wolens*, 513 U.S. at 231.

621 *Seals*, 924 F. Supp. at 859.

622 *See id.*

court denied the negligence claim summary judgment motion.[623]

XII. AIRPORTS

A. NUISANCE ACTIONS

County of Westchester v. Town of Greenwich, Connecticut[624] involved the Westchester County Airport, whose New York property bordered the New York–Connecticut state line, and the Convent of the Sacred Heart, located in Connecticut and bordering the airport property. Trees, which were small and unobtrusive in 1942 when the airport was built for military use, had grown to a height that impinged on the glide slope for runway 11/29. The usable length of the runway had been reduced from 4450 feet to 1350 feet because of the extreme angle of descent that was required to land on the runway over the trees. The operators of the airport instituted various legal actions throughout the years against the Convent and the state of Connecticut in an attempt to cut down the trees so that the runway could be used in its full capacity. However, the operators lost at every level. The final attempt to shorten the trees was framed as a public nuisance action against the defendants. The District Court granted the Convent's summary judgment motion, and this case was a review of that decision.

The court stated that for the County of Westchester to prevail, it must establish that some offensive or obstructive condition interfered with a right common to the general public.[625] In addition, the county was required to prove that "(1) the condition complained of has a natural tendency to create danger and inflict injury upon persons or property, (2) the danger is a continuing one, (3) the use of the land is unreasonable or unlawful, and (4) the existence of a nuisance is the proximate cause of the plaintiff's injuries and damages."[626]

The court of appeals, in determining the reasonableness of the use of land (for example, growing trees, as in this case), bal-

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[623] *See also* Travel All Over The World, Inc. v. Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996); Capacchione v. Qantas, 25 Av. L. Rep. (CCH) ¶ 17,346 (C.D. Ca. 1996); Trinidad v. American Airlines, 932 F. Supp. 521 (S.D.N.Y. 1996); Continental Airlines v. Shupe, 920 S.W.2d 274 (Tex. 1995); Johnson v. American Airlines, 663 N.E.2d 54 (Ill. App. 1996). *See also* Musson Theatrical v. Federal Express Corp., 89 F.3d 1244 (6th Cir. 1996).

[624] 76 F.3d 42 (2d Cir. 1996).

[625] *See id.* at 45.

[626] *Id.*

anced the competing interests of the plaintiff and the defendant. The court stated, "[c]ommon sense dictates that the quite ordinary activity of growing trees on one's land is, without more, presumptively reasonable."[627] The court quoted the United States Supreme Court in saying, "the use of land presupposes the use of some of the airspace above it . . . . Otherwise, no home could be built, no tree planted, no fence constructed, no chimney erected."[628]

Balanced with the plaintiff's interest was the county's interest in raising the existing level of operations at its airport. The court did not favor the county's interest because, as it pointed out, the airport began operations without securing the property rights necessary to achieve that desired level of operations.[629] The court cited *Griggs*, in which the Supreme Court noted that a "local airport owner is as responsible 'for the air easements necessary for operation of the airport [as it is for] the land on which the runways were built.'"[630] In an attempt to better illustrate the point in this case, the court of appeals quoted the lower court's opinion:

> [i]f normally unobjectionable land use such as growing trees can be transformed into an "unreasonable" activity by the act of building an airport that lacks the necessary property rights for full operation, then there would be no reason for airports to ever bother paying for property rights beyond those needed for the land the airport actually occupies, because the airports could acquire the air easements they needed without cost by bringing nuisance suits against any landowner whose property contained structures blocking, or threatening to block, the airports' "runways" clear zones.[631]

Because the plaintiff was unable to establish the unreasonable or unlawful element necessary for a public nuisance claim, the court held for the defendant.[632]

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627 *Id.* at 45 n.1.

628 *Id.* at 45 (quoting Griggs v. Allegheny County, 369 U.S. 84, 89 (1962)).

629 *See id.*

630 *Id.* (quoting *Griggs*, 369 U.S. at 89).

631 County of Westchester v. Town of Greenwich, Conn., 870 F. Supp. 496, 505 n.7 (S.D.N.Y. 1994).

632 *See id.* at 505.

B. Lessees

The plaintiff in *Metropolitan Express Services, Inc. v. City of Kansas City, Missouri*[633] was an airport grounds transportation company operating out of the Kansas City Airport. The company discontinued its services as a result of what later became an illegal exclusive concession agreement between a competitor and the city. The plaintiff sued seeking lost profit damages. The court did not award the lost profits because the plaintiff failed to show previous profits necessary to satisfy Missouri's strict standard for recovering lost profits.[634]

C. User Fees

The controversy in *Era Aviation, Inc. v. Campbell*[635] originated when the Alaska Department of Transportation and Public Facilities promulgated a regulation which increased landing fees at Alaska's rural airports. In 1991, several air carriers (not parties to the present action) filed suit alleging that the regulation was illegal and requesting injunctive relief and a refund of the landing fees previously paid. In 1993, the Alaska Superior Court granted summary judgment to those plaintiffs on the basis that the regulation did not comply with the Alaska Administrative Procedure Act and was, thus, invalid and unenforceable. The court enjoined the department from collecting any more fees under the regulation. Four days before this ruling, Alaska Airlines, Aleutian Airways, Northern Air Cargo, and Peninsula Airways moved to intervene in the litigation. The court granted their motion. The department requested the opportunity to later assert new defenses against the four new plaintiffs' claims for previously paid landing fees. Later in 1993, Era Aviation filed a separate lawsuit to recover landing fees it had previously paid. The court consolidated this action with the one brought by the intervenors. At this point, the department moved for summary judgment, which the court granted, holding that the intervenors and Era Aviation were required to protest the landing fees when they paid them, and they failed to do so. Also, the court held that the equal protection clause of the Alaska Constitution did not require that refunds be paid out to all carriers, even though refunds had been paid to the original plaintiffs in

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633 71 F.3d 273 (8th Cir. 1995).

634 *See id.* at 275.

635 915 P.2d 606 (Alaska 1996).

the action.[636] The intervenors and Era Aviation appealed the decision.

The *Era Aviation* court determined that the dispute revolved around whether an action in assumpsit required a protest at the time of payment, or whether such a protest applied only to tax payments and not user fees.[637] The court reviewed the law of assumpsit in Alaska and held that "under common law, as well as under statute, a protest at the time of payment is a prerequisite for an action to recover taxes."[638] The court concluded that the requirement of a formal protest at the time of payment applied to all actions in assumpsit brought against a government entity.[639] It reasoned that such a rule is beneficial because it establishes a uniform requirement for all actions in assumpsit in Alaska.[640]

The court then answered the question of whether the air carriers protested the regulation at the time of payment. The court disregarded the air carriers' argument that they had protested by way of lobbying extensively before the department and the Alaskan legislature in an attempt to prevent the adoption of the regulation.[641] The court stated, "However, . . . virtually every regulation or statute is opposed by some subset of the polity."[642] The court held that such lobbying did not provide adequate notice to the government that the carriers might someday sue and seek a refund of the monies they had paid.[643] The court stated that for a party to later bring an action in assumpsit, the payer must specifically "notify the State" that it intends to seek reimbursement.[644] "Because there is no evidence in the record that such notice was given, summary judgment was proper."[645]

The air carriers lastly argued that reimbursing the original plaintiffs while denying them repayment violated the equal protection clause of the Alaskan Constitution.[646] The court found a strong distinction between protesting and non-protesting payers

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636 *See id.* at 613.
637 *See id.*
638 *Id.*
639 *See id.* at 611.
640 *See id.*
641 *See id.* at 612.
642 *Id.*
643 *See id.*
644 *Id.* at 611.
645 *Id.* at 612.
646 *See id.* at 613.

of the landing fee, and, thus, found no equal protection violation.[647] The court affirmed the lower court's judgment.

D. TAKINGS CASES

The plaintiff in the case of *National By-Products, Inc. v. City of Little Rock*[648] was an animal by-products rendering plant. Plaintiff's facility was located between the north end of one of Little Rock Airport's runways and the south bank of the Arkansas River. According to the plaintiff, the Little Rock Regional Airport Commission began planning in 1985 to acquire the property for noise mitigation purposes. Later, this plan expanded to include lengthening the runway. In attempting to acquire the plaintiff's plant, the commission applied for FAA funds. The commission appraised the plaintiff's property and acquired all residential properties in the area. The commission released details of the runway extension plan to the media, and filed and recorded project maps about the project with the FAA.

As a result of the publicity surrounding the possible future acquisition of National By-Product's rendering plant, its competitors approached the plaintiff's customers and informed them of the possibility that the plaintiff might have to move and close its operations. As a result, plaintiff lost customers and profits. The plaintiff filed suit for inverse condemnation, claiming that the commission's actions of publicizing the commission's intent to acquire the property substantially deprived the plaintiff of its use and enjoyment of its property. Therefore, the property was rendered unfit for its highest and best commercial use. The unfitness for commercial use of the plaintiff's property was caused by its competitors' actions rather than the direct result of the commission's actions.

On appeal, the Arkansas Supreme Court defined "inverse condemnation" as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by a governmental entity although not through eminent domain procedures."[649] However, the court noted, "it has been held that damages for loss of business and depreciation of property resulting from the condemnation of adjacent land are noncompensable where there is no interference with possession,

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[647] *See id.*

[648] 916 S.W.2d 745 (Ark. 1996).

[649] *Id.* at 747.

use, or enjoyment of such land."[650] The court then quoted the United States Supreme Court, which stated that "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."[651]

In reaching its conclusion, the Arkansas Supreme Court decided to follow the general rule in many jurisdictions that the "mere plotting or planning in anticipation of an improvement does not constitute a taking or damaging of the property affected where the government has not imposed a restraint on the use of the property."[652] The court determined that prohibiting such causes of action allows governments to plan public works projects without the specter of lawsuits hanging over their heads.[653] Such a threat might encourage the government to keep such projects secret, to limit public input as to the projects, and to forestall any meaningful review of environmental consequences.[654] Based upon this definition of inverse condemnation, the court found that the plaintiff had no cause of action because the property continued to be used as a rendering plant and, as such, the plaintiff suffered no damages that could be compensable under an inverse condemnation lawsuit.[655]

The issue in *Jackson v. Metropolitan Knoxville Airport Authority*[656] was whether a cause of action existed for inverse condemnation where the use and enjoyment of property was disturbed by noise vibration and pollutants from airplanes that flew near, but not directly over, the plaintiff's property. The defendant claimed that there was no action for inverse condemnation because plaintiff did not allege a physical invasion of property, which in this case would require an allegation of direct overflight.[657]

The Tennessee Supreme Court relied on *Thornburg v. Port of Portland*,[658] in which the Oregon Supreme Court held that systematic flights that passed close to private land, but not directly

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650 *Id.* at 748 (citation omitted).

651 *Id.* (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)).

652 *National By-Products*, 916 S.W.2d. at 749.

653 *See id.* (quoting Westgate, Ltd. v. State, 843 S.W.2d 448 at 453 (citation omitted)).

654 *See id.*

655 *See id.*

656 922 S.W.2d 860 (Tenn. 1996).

657 *See id.* at 862.

658 376 P.2d 100 (Or. 1962).

overhead, constituted a taking.[659] The Tennessee court concluded, "Obviously, continuous noise, pollutants and vibration from planes flying nearby can interfere with a property owner's beneficial use and enjoyment just as surely as noise, pollutants and vibration from planes flying directly overhead."[660] The court adopted the view that direct overflight was not a requirement to establish a prima facie case for inverse condemnation.[661]

The Tennessee court then defined a standard to be applied by juries in determining whether a compensable taking had occurred. Relying again on *Thornburg*, the court adopted a private nuisance standard, stating that the plaintiff must show a repeated, direct, and substantial interference that uniquely affects the beneficial use and enjoyment of the property at issue.[662]

The plaintiffs in *Lopez-Aponte v. Columbus Airport Commission*[663] challenged the Columbus Airport Commission's (CAC) ability to condemn their property for an aviation easement. The court analyzed the Georgia law of eminent domain and stated, "It is clear that the power of eminent domain was not expressly granted to CAC by the legislature, but remained with [the county]. All other methods of acquiring property were expressly granted to CAC by the legislature."[664] The CAC relied on the power of eminent domain to acquire property when the CAC claimed the power to condemn the plaintiff's property. However, the court did not agree that such power had been granted to the CAC. "Had the legislature intended to grant directly to CAC the power of eminent domain, it could easily have done so expressly."[665]

The CAC then argued that since it was an independent political subdivision of the state of Georgia, it had the authority to condemn property for airport purposes pursuant to the Georgia statute section 6-3-22.[666] The court found otherwise, however, stating that the statute "does not independently grant the power of eminent domain to any entity. It simply provides that condemnation may be used to obtain title to property for airport

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659 *See Jackson*, 972 S.W.2d at 862.
660 *Id.* at 864.
661 *See id.*
662 *See id.*
663 473 S.E.2d 196 (Ga. App. 1996).
664 *Id.* at 198.
665 *Id.* at 199.
666 *See id.*

purposes where such action is otherwise authorized by the entity seeking title."[667]

The plaintiffs in *Fullerton v. Knox County Commissioners*[668] were land owners whose property was taken as an aviation easement for the expansion of the Knox County Regional Airport. The lower court determined that the taking amounted to a direct and immediate interference with the enjoyment and use of the plaintiffs' property and awarded the plaintiffs the fair market value of their property, $165,000, less the amount already paid for the easements, for a net compensation of $130,000. The plaintiffs appealed to the Maine Supreme Court, arguing that the lower court failed to award prejudgment and post judgment interest.

The Maine Supreme Judicial Court, in another case addressing government takings, held that plaintiffs were entitled to the interest from the date of taking:

> Article I, § 21 of the Constitution of Maine, providing [that] "private property shall not be taken for public uses without just compensation," constitutionally mandates payment of interest from the date of taking in order that the property owner receive "just compensation."[669]

Because the lower court held that the taking of the easements amounted to a direct and immediate interference with the plaintiffs' enjoyment and use of their property, the Maine Supreme Court held that plaintiffs were entitled to the interest from the date of taking.[670]

In *Richmond, Fredericksburg & Potomac Railroad Co. v. Metropolitan Washington Airports Authority*,[671] a railroad-owned property adjacent to Washington National Airport was the disputed property. Seventeen acres of the property lay within the clear zone of the airport's runway 15/33. A clear zone, as defined by the FAA, prohibited any development that would attract a "congregation of people." Plaintiff alleged that the Metropolitan Washington Airport Authority (Authority), an interstate entity with the responsibility of operating Washington National Airport and Washington Dulles International Airport with the availability of eminent domain to carry out those operations, engaged in in-

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667 *Id.*

668 672 A.2d 592 (Me. 1996).

669 *Id.* (quoting Milstar Mfg. Corp. v. Waterfield Urban Renewal Auth., 351 A.2d 538, 544 (Me. 1976) (citation omitted)).

670 *See id.* at 594.

671 468 S.E.2d 90 (Va. 1996).

verse condemnation. The Authority made an agreement with the FAA to either acquire the clear zone area or obtain an aviation easement.

The plaintiff lost at the trial court level and appealed, claiming that the trial court erred in holding that the Authority did nothing to take or to damage the plaintiff's property within the meaning of the takings clause in the Virginia Constitution. The Virginia Supreme Court dismissed the plaintiff's claim that the Authority's actions prevented the plaintiff from developing the property in question. The court pointed out that the Authority had resisted pressure from the FAA to acquire the clear zone property.[672] Additionally, the court found that the Authority did not take the plaintiff's land when the authority used it either for overflights or as a runway protection zone.[673] The court quoted the United States Supreme Court's holding that "[f]lights over private land are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[674] The court found that an invasion of the plaintiff's airspace rights had not occurred.[675]

The litigation in *City of Iowa City v. Hagen Electronics, Inc.*[676] arose when Iowa City substituted Runway 6/24 for Runway 17/35 as the airport's primary runway, and extended Runway 6/24 by 355 feet. This change and extension infringed upon the plaintiff's neighboring property height limitations and zoning ordinance restrictions. The plaintiff filed suit contesting the city's authority to impose these restrictions.

The court determined that the plaintiff did not exhaust all available administrative remedies before resorting to litigation.[677] The plaintiff maintained that he failed to do so because any administrative remedies would have been inadequate and the pursuit would have been futile.[678] The court disagreed, however, stating that "[o]ther evidence in the record leads us to conclude that the outcome at the administrative level may well have been different had [plaintiff] pursued his available remedies."[679] The court concluded that "[i]n the absence of proof

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672 *See id.* at 97.

673 *See id.*

674 *Id.* (quoting United States v. Causby, 328 U.S. 256, 266 (1946)).

675 *See id.*

676 545 N.W.2d 530 (Iowa 1996).

677 *See id.* at 534.

678 *See id.*

679 *Id.* at 535.

that a landowner has pursued all statutorily available avenues for challenging zoning decisions, a reviewing court is in no position to determine whether the landowner has, in fact, been denied just compensation based on an alleged regulatory taking."[680] The court dismissed the plaintiff's substantive due process argument, and stated that the city had a rational basis for adopting the ordinances.[681]

The plaintiffs in *Watson v. City of Atlanta*[682] owned apartment units located near Hartsfield International Airport, which is owned by the city of Atlanta. The city attempted to reduce land uses incompatible with the amount of noise generated at Hartsfield by creating a program in which they bought single-family residential property near the airport. The city chose not to buy back the plaintiffs' property (multi-family units) on the basis that apartment dwellers found excessive noise less objectionable than single-family unit dwellers. The plaintiffs then brought an action for nuisance and inverse condemnation.

The plaintiffs maintained that the city's decision was arbitrary, capricious and irrational and that the decision violated their equal protection rights.[683] The court found no facts to support the distinction between single family and multi family units.[684] It held that the line drawn between the two was done with no objective reason, and, thus, denied the plaintiff's arguments.[685]

The plaintiffs in *Southfund Partners v. City of Atlanta*[686] owned land near Atlanta's Hartsfield International Airport. They filed suit against the city of Atlanta claiming that alterations in flight patterns and an increase in noise over the property since it was purchased have made the property unmarketable. The trial court found that the claims were time barred because they were brought more than four years after the alleged taking and damages were apparent.[687]

The court first determined that the plaintiff's claims were governed by the four-year statute of limitation for trespassing under Georgia law.[688] Because the plaintiff's complaint was filed on

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680 *Id.*
681 *See id.* at 536.
682 466 S.E.2d 229 (Ga. App. 1995).
683 *See id.* at 231.
684 *See id.* at 232.
685 *See id.*
686 472 S.E.2d 499 (Ga. App. 1996).
687 *See id.* at 500.
688 *See id.* at 501.

September 28, 1994, the cause of action must have accrued after September 28, 1990, for the statute of limitation to take effect.[689] The city of Atlanta presented evidence demonstrating that there had been an increase in quieter planes over the plaintiff's property since 1990, and that the total number of flights had not increased since 1990. The court concluded:

> The [c]ity's evidence as to the frequency of flights, flight patterns, and reduction in numbers of flights of Stage 2 aircraft, is sufficient to show there has been no increase in the nuisance over [the plaintiff's] property and, if [plaintiff] had a cause of action, it accrued more than four years prior to the date of filing of their complaint.[690]

The plaintiff then argued that its cause of action did not accrue until it was denied compensation for the taking.[691] The court disagreed, stating, "we find the moment of taking to be the time when the runways became operational and the injury became immediately apparent. . ., this is still outside the four year statute of limitation."[692]

The plaintiff then argued that the statute of limitations did not apply because the airport is a continuing nuisance, and, thus, the statute of limitations should run with each fresh occurrence of the nuisance.[693] The court dismissed this claim, finding the airport to be a permanent, rather than a continuing nuisance.[694]

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689 *See id.*
690 *Id.*
691 *See id.*
692 *Id.*
693 *See id.* at 501-02.
694 *See id.* at 502.

Panel Discussion


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS